No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1994

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QUESTIONS PRESENTED

1. Whether a public employee's petition, like speech, must involve a matter of public concern to invoke First Amendment protection against discharge from public employment.

2. Whether the failure to "tread with a certain amount of care" is an insufficient degree of culpability to make a governmental entity liable under 42 U.S.C. § 1983 for the unconstitutional act of its nondecisionmaking subordinate.

3. Whether a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 requires a public employee to show that a public employer decisionmaker acted with purposeful intent to retaliate against him for his exercise of First Amendment rights.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court and the names of all parties appear in the caption of this case.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Rutgers, The State University of New Jersey, states that it is a body both corporate and politic, pursuant to N.J. Stat. Ann. 18A:65-2 (West 1989), and that it has no parent or subsidiary corporations.

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IN THE

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No. ___

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

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Petitioners, Michael Bongiovanni, Anthony S. Cicatiello, Adrienne S. Anderson, Donald M. Dickerson, Floyd H. Bragg, and Norman Reitman, individually and as members of the Board of Governors of Rutgers, The State University, and Rutgers, The State University of New Jersey, respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 21, 1994.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is not reported (App. 56).[1] The opinion of the United States Court of Appeals for the Third Circuit, issued July 21, 1994, is reported at 30 F.3d 424 (App. 3). The order of the United States Court of Appeals for the Third Circuit, entered August 18, 1994, denying a petition for rehearing and suggestion for rehearing in banc, but which three Circuit Judges would have granted, is not reported (App. 93).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered July 21, 1994, the same date its opinion was issued (App. 1, 3).

A timely petition for rehearing and suggestion for rehearing in banc, filed August 3, 1994, was denied by the United States Court of Appeals for the Third Circuit by an order entered August 18, 1994 (App. 93).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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[1] "App." refers to the Appendix to the Petition. "A" refers to the Appendix filed with the Third Circuit. "SA" refers to the Supplemental Appendix filed with the Third Circuit.

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

STATEMENT OF THE CASE

A. Proceedings Below

Respondent Joseph San Filippo, Jr. ("Dr. San Filippo") was a tenured chemistry professor at petitioner Rutgers, The State University of New Jersey ("Rutgers"), until he was dismissed for cause on May 13, 1988 by Rutgers' Board of Governors (the "Board"), six former members of which are petitioners

herein (A33 to 35 ¶¶ 2 to 9; A45 to 46 ¶ 22). Dr. San Filippo instituted this suit in the United States District Court for the District of New Jersey against Rutgers and the Board members who voted in favor of his dismissal, under 42 U.S.C. § 1983 and state law, alleging the dismissal violated his speech, petition, equal protection, and due process rights under the United States and New Jersey Constitutions, and violated his common law contract rights (A33 to 51).

The district court granted complete summary judgment to Rutgers and the Board members, determining as to the First Amendment speech and petition claims: (1) Dr. San Filippo's grievances and lawsuits did not involve matters of public concern and, thus, were not protected activity under the First Amendment petition clause (App. 73-83); (2) Dr. San Filippo's alleged speech involved matters of public concern and, thus, was protected activity under the First Amendment speech clause (App. 83-84); (3) Dr. San Filippo could establish a causal nexus between his protected speech and the Board's dismissal of him by a mere showing of a temporal proximity between the speech and the dismissal (App. 84-87); and (4) Rutgers showed that Dr. San Filippo was dismissed for the nine incidents of misconduct, detailed in the Board's decision, which were completely unrelated to speech, and Dr. San Filippo could not establish that the articulated reasons were pretextual (App. 87-91).

The Court of Appeals for the Third Circuit vacated the district court's summary judgment grant on the First Amendment petition and speech claims and remanded for further proceedings. First, contrary to seven other courts of appeals, two members of the panel determined that a public employee's petition need not involve a matter of public concern to state a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 (App. 21-39). Circuit Judge Becker, dissenting on this issue, would have followed "the reasoning of the other circuits . . . and the inexorable logic of *McDonald v. Smith*, 472 U.S. 479 (1985)" (App. 50-53). Second, the court of

appeals held that "deliberate indifference" sufficient to impose 42 U.S.C. § 1983 entity liability upon Rutgers could be established by a showing that the decisionmaking Board, even though it made its own dismissal decision on the basis of independent fact hearings and findings, failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his nondecisionmaking chemistry professor colleagues were motivated by his First Amendment activities in their recommendation that dismissal proceedings be instituted (App. 6, 43-44, 44n.26). Third, the court of appeals held that the degree of culpability necessary to establish a First Amendment retaliatory discharge claim against the decisionmaking Board under 42 U.S.C. § 1983 is deliberate indifference, defined as a failure to "tread with a certain amount of care"—which could be established by a showing that the decisionmaking Board, even though it made its own dismissal decision on the basis of independent fact hearings and findings, failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his nondecisionmaking chemistry department colleagues were motivated by his First Amendment activities in their recommendation that dismissal proceedings be instituted (App. 6, 43-44, 44n.26).

Following the issuance of the Third Circuit's panel decision, Rutgers and the Board members filed a petition for rehearing and suggestion for rehearing in banc, regarding the novel legal determinations made by the panel, which are contrary to this Court's precedent, the Third Circuit's precedent, and to the law established in the majority of the other circuits. Although the petition for rehearing was denied, Circuit Judges Becker, Hutchinson, and Scirica would have granted a rehearing (App. 94).

B. Facts

In the Fall of 1985, a janitor at Rutgers expressed grave concern to a Rutgers officer that Dr. San Filippo was mistreating visiting Chinese scholars (A129). A preliminary

investigation to determine whether there was any basis for the janitor's report and any cause for concern resulted in two research scholars, Changhe Xiao and Hetian Gao, and one professor, Yaru Zang, all visiting from the People's Republic of China at Dr. San Filippo's invitation and working in Dr. San Filippo's laboratories at Rutgers, coming forward with their complaints about mistreatment by Dr. San Filippo (App. 199-233, A129-130, 345-360). They had not come forward until the janitor's report prompted them, due to their fear of Dr. San Filippo (App. 231; A359-360).

The authenticity of a letter of recommendation purportedly emanating from a Chinese university, and the propriety of Dr. San Filippo's having hired Peng Zhou in 1984, as a "post-doctoral" fellow funded by an NSF grant, were already under review in early 1985, by a Rutgers graduate program and Dr. San Filippo's department, upon Dr. San Filippo's submission of application materials for Peng Zhou for admission to graduate school to pursue a doctoral degree (A338-342, 388-399, 422-428, 451-452, 486, 496-500, 502, 569, 578).

After the complaints of the visiting Chinese scholars and professor were brought to Rutgers' attention in the Fall of 1985, other questionable conduct of Dr. San Filippo was brought to Rutgers' attention: (1) a Rutgers stockroom clerk informed Rutgers of Dr. San Filippo's abusive treatment of Zong Ping Chen, a graduate student and Dr. San Filippo's research advisee, while Ms. Chen was teaching a class in March 1986 (A369-387, 401-404, 571, 573, 575-576; SA3-5); (2) a Rutgers technician informed Rutgers, in February 1986, through testimony in a lawsuit, that Dr. San Filippo had authorized payment of wages for time not worked (A165-167, 169-174); (3) Rutgers was informed, by the submission of time reports for the payment of wages by Cong Yuan Guo, Zhen-min He, and Peng Zhou in January 1986, that Dr. San Filippo had permitted unauthorized persons to work in his Rutgers laboratories (A361-364, 405-411, 548, 550).

After the initial allegations of Dr. San Filippo's mistreatment of visiting Chinese scholars came to light, Dr. San Filippo's dean told him and his union counsellor of the allegations at a meeting in November 1985 (A471). Dr. San Filippo generally denied everything, but demanded the allegations be reduced to writing (A126, 178 to 181, 471). The dean obliged with a January 1986 letter to which Dr. San Filippo responded in writing, admitting many of the facts, but denying that what he had done was wrong (App. 194; A475-488).

Pursuant to Rutgers' regulations (App. 236-237), recommendations as to whether dismissal proceedings should be commenced was obtained from two separate groups of Dr. San Filippo's faculty peers and three academic officers of the University (App. 183-193) before formal charges were made by Rutgers' President (App. 178-182). The regulations expressly provide that such recommendations are to be made "without discrimination because of . . . views on any subject" (App. 237). The regulations also provide: "[T]he faculty member, as a private citizen, enjoys the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of those rights." (App. 236).

Pursuant to Rutgers' regulations, Dr. San Filippo was afforded a hearing, which lasted 46 days, before a hearing panel of five tenured faculty peers, selected by lot and subject to challenges for cause and peremptory challenges (App. 237-238). No member of the hearing panel was from the chemistry department and no member of the hearing panel is alleged by Dr. San Filippo in this lawsuit to have retaliatory motives (App. 44, 100). Dr. San Filippo was represented at the hearing by attorneys of his own choosing, whose fees were paid by Rutgers (App. 238). Thereafter, the hearing panel rendered a 44-page written decision setting forth its fact-findings and recommending Dr. San Filippo's dismissal (App. 149-177).

The decisionmaking Board considered, in rendering its 60-page decision: (1) the record of 46 days of hearings before the hearing panel, which consisted of 5800 transcript pages of testimony of 33 witnesses and over 400 exhibits; (2) the hearing panel report; (3) a 417-page written brief and oral argument by Dr. San Filippo's attorneys; and (4) an "amicus" brief by Dr. San Filippo's union (App. 101-106).

Not one of the recommendations for the institution of dismissal proceedings, the President's charges, or the hearing panel decision, nor the Board's opinion itself, stated or implied that dismissal proceedings should be commenced, or Dr. San Filippo should be dismissed, for anything other than the misconduct expressly alleged, charged, and proven (*i.e.*, not one reference was made to Dr. San Filippo's alleged First Amendment activities) (App. 95-193).

As stated by the Board in its 60-page decision, the Board decided to dismiss Dr. San Filippo for the misconduct alleged, charged, and proven, as found by the five-member faculty hearing panel after 46 days of hearing: (1) compelling visiting Chinese research scholars, Mr. Xiao and Mr. Gao, to perform gardening and cleaning work at his home; (2) failing to arrange for health benefits for Mr. Xiao despite his promise to do so and his deduction of money from Mr. Xiao's salary for the express purpose of purchasing health benefits; (3) threatening and harassing Mr. Xiao, Mr. Gao, and other visiting Chinese scholars; (4) treating a Chinese teaching assistant and graduate student, Ms. Chen, in an unprofessional, threatening, and abusive manner; (5) directing the uninsured Mr. Xiao, injured when he fell from a ladder while cleaning windows at Dr. San Filippo's house, to permit himself to be identified as the insured Mr. Zhou to obtain treatment at a hospital; (6) authorizing a false time report by a subordinate employee to permit wage payment for time not worked; (7) hiring Mr. Zhou as a postdoctoral fellow to be paid on a National Science Foundation grant while knowing Mr. Zhou did not have a doctoral degree; (8) submitting to a graduate school admis-

sions office, on behalf of Mr. Zhou, a letter appearing to be, but which Dr. San Filippo knew in fact was not, prepared and signed by one Liu Guozhi of Changchun Institute; and (9) permitting three Chinese graduate students, who were not authorized to do so, to work in his Rutgers laboratories (App. 95-148).

During the hearings, Dr. San Filippo introduced evidence of his alleged First Amendment activities (speech, grievance, lawsuits), evidence that two other faculty members had had students help at their homes, and evidence of his department colleagues' alleged personal vendetta against him. Dr. San Filippo's attorney argued to the Board that such evidence demonstrated that his department colleagues' recommendation of dismissal proceedings (App. 193) was improperly motivated. This contention was addressed by the Board's decision as involving "factual issues which involve . . . determinations of credibility (including motives for testifying) and relevance," which "determinations are the responsibility of the [hearing] Panel," and the "Panel neither shirked its responsibility in this regard nor made findings which lacked the necessary factual predicates" (App. 132).

Dr. San Filippo's First Amendment claim in this lawsuit is that the recommendation by his chemistry department colleagues that dismissal proceedings be instituted was motivated by his alleged First Amendment activities (speech, grievance, lawsuits) and that this alleged unconstitutional motivation should be imputed to both Rutgers and the decisionmaking Board in its decision to dismiss him.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit holding that a public employee's petition, unlike speech, need not involve a matter of public concern to invoke First Amendment protection against discharge from employment is in direct conflict with the decisions of seven other courts of appeals, is plainly inconsistent with the Court's controlling principles established by *Connick v. Myers*, 461 U.S. 138 (1983), and *McDonald v. Smith*, 472 U.S. 479 (1985), involves an important First Amendment question, and involves an important issue affecting the public interest.

The Court has long held that a public employee cannot state a First Amendment retaliatory discharge claim on the basis of speech that does not involve a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 143-147 (1983), citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), its antecedents, and its progeny. Only when a public employee speaks as a citizen on matters of public concern and not as an employee on matters of personal interest does his or her activity rise to the level of protected First Amendment activity. *Connick*, 461 U.S. at 147.

> The repeated emphasis in *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

461 U.S. at 143.

> Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for

> the government. This does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

461 U.S. at 147.

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146.

The Court held, in *McDonald v. Smith*, 472 U.S. 479, 485 (1985), that unprotected speech is not transformed into protected First Amendment activity under the Petition Clause simply by clothing the speech in a petition to the government. The rights and guarantees under the Free Speech Clause and the Petition Clause of the First Amendment are "cut from the same cloth" and "are inseparable," the Petition Clause conferring no "special First Amendment status." 472 U.S. at 482, 485. Thus, "there is no sound basis" for granting greater First Amendment protection to a petition—whether a letter to the President, as in *McDonald*, or a lawsuit complaint, as here—than to "other First Amendment expressions." 472 U.S. at 484-85.

The eight other courts of appeals that have addressed the issue—seven by decision, one by dictum—have linked the controlling principles of *Connick* and *McDonald* to conclude that, like speech, a petition to the government, be it a letter or grievance to the government employer or a lawsuit, must involve a matter of public concern to constitute the protected First Amendment activity necessary to establish a First Amendment retaliatory discharge claim. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir.), *cert. denied*, 114 S. Ct. 185 (1993); *Rathjen v. Litchfield*, 878 F.2d

836, 841-42 (5th Cir. 1989); *Day v. South Park Independent School District*, 768 F.2d 696, 699-703 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 720-21 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988);*Phares v. Gustafsson*, 856 F. 2d 1003, 1009 (7th Cir. 1988); *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 418-20 (7th Cir. 1988); *Altman v. Hurst*, 734 F.2d 1240, 1243-44 and 1244n.10 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.), *cert. denied*, 469 U.S. 823 (1984); *and see Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991).

The Third Circuit held that a public employee's petition, unlike speech, need not involve a matter of public concern to invoke First Amendment protection against discharge from employment. Thus, its decision stands directly in conflict with these seven other courts of appeals as expressly stated by the majority in the court's opinion: "Recognizing that the question is a difficult one, we find ourselves unable to subscribe to the reasoning of our sister circuits" (App. 31). Further, the majority made the unprecedented distinction between a petition to the government that contemplates a response, *e.g.*, a lawsuit or a grievance, and one that does not, holding the former a protected First Amendment activity, even if it does not involve a matter of public concern, as long as it is "non-sham" (App. 35-39). This distinction is contrary to the Court's consideration, in *McDonald*, 472 U.S. at 484-485, of lawsuits and letters to the President on equal footing as petitions to the government.

Judge Becker's dissenting opinion on this issue provides good reason as to why this Court should review the decision below:

> I need not offer extended justification for my position, for the majority has already done so when describing these other circuits' views at pages 19 to 33 of its opinion. Although the majority then arrives at a conclusion in contradistinction to its preceding analysis, the majority's rationale supporting its conclusion pales by comparison with the reasoning of the other circuits and with the inexorable logic of *McDonald v. Smith*, 472 U.S. 479 (1985).
>
> . . . .
>
> In my view, the Supreme Court would be surprised to learn that, although, as a result of "the nature of the government's mission as employer," a public employer (such as Rutgers) can fire someone who "begins to say or do things that detract from the agency's effective operation" so long as the speech is on a matter of private concern, *Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (May 31, 1994) (quoted in Majority Typescript at 33), the government cannot fire the same individual if he or she speaks after invoking a formal mechanism for the redress of grievances (or speaks through that forum). Such an interpretation of the Petition Clause, rather than making that clause a "trap for the unwary" as the majority contends would be the consequence of my interpretation of the Clause, Majority Typescript at 35, is an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined. This would undermine the government's special role as an employer.

(App. 50-51).

The decision of a majority of the panel below also produces the anomaly that lawsuits and grievances which do not involve matters of public concern are protected First Amendment activity sufficient to establish a First Amendment retaliatory discharge claim, but testimony given in connection

with such lawsuits and grievances is not protected First Amendment activity unless such testimony involves matters of public concern. Under the decisions of the Court and several courts of appeals, testimony before a government fact-finding body is a form of speech and, thus, protected First Amendment activity for the purposes of a public employee's retaliatory discharge claim, only when it involves matters of public concern. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (holding that a teacher's testimony before legislative committees concerning the state's education policies was protected speech under the First Amendment where it involved matter of public concern). *Accord Piesco v. City of New York*, 933 F.2d 1149, 1156-57 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Reeves v. Claiborne County Bd. of Ed.*, 828 F.2d 1096, 1100-01 (5th Cir. 1987); *Patteson v. Johnson*, 721 F.2d 228, 232-33 (8th Cir. 1983); *Langley v. Adams County*, 987 F.2d 1473, 1478-79 (10th Cir. 1993); *Martinez v. City of Opa-Locke*, 971 F.2d 708, 712 (11th Cir. 1992).

Left unreviewed, the Third Circuit decision is a harkening bell to every public employee within the purview of the Third Circuit—especially those whose employment performance is questionable—to formulate every private concern as a grievance or lawsuit in order to provide a First Amendment shield against adverse employment action in the future. Nor is this fear unjustified in view of the unprecedented statement of the majority of the panel below: "The First Amendment's petition clause imposes upon the United States an obligation to have at least some channel open for those who seek redress for perceived grievances" (App. 35). Thus, the Third Circuit decision ignores *Connick*'s warning that "one employee's dissatisfaction" with an adverse personnel decision should not "plant the seed of a constitutional case." 461 U.S. at 148-49.

If this reasoning is permitted to stand, every public employer in the Third Circuit contemplating the discharge of a public employee who has previously filed a grievance or lawsuit regarding any conceivable matter of private concern

will now have to balance the monetary cost to the public of a costly, full-scale defense of the First Amendment retaliatory discharge claim that almost certainly will follow against the monetary cost and disservice to the public of retaining an employee whose nonprotected misconduct or employment performance warrants termination, even in cases where that misconduct has been found to cause harm to others.

II. The Third Circuit holding that a governmental decisionmaker's failure to "tread with a certain amount of care" is a sufficient degree of culpability to hold a governmental entity liable under 42 U.S.C. § 1983 for the isolated unconstitutional acts of its nondecisionmaking subordinate conflicts with the Court's precedent established in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Canton v. Harris*, 489 U.S. 378 (1989), involves an important constitutional question, and involves an important issue affecting the public interest.

The Third Circuit decision holds that Rutgers is liable under 42 U.S.C. § 1983 if its policymaking, decisionmaking Board failed to "tread with a certain amount of care" as to Dr. San Filippo's assertions that his department colleagues—nonpolicymaking and nondecisionmaking subordinates—were motivated by his First Amendment activities in recommending that dismissal proceedings be commenced (App. 6, 43-44, 44n.26). Although the Third Circuit purported to apply the "deliberate indifference" standard of fault established by the Court in *Canton v. Harris*, 489 U.S. 378 (1989), its use of the phrase failure to "tread with a certain amount of care" describes instead a simple negligence standard.

The Third Circuit decision both removes the causation and lessens the degree of fault necessary to hold a public entity liable for the alleged unconstitutional acts of its subordinates, contrary to the Court's precedent.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that a governmental entity can be found liable under 42 U.S.C. § 1983 only when that entity itself causes the constitutional violation at issue.

> [I]t is when "execution of a government's policy or custom . . . inflicts the injury" that the government as an entity is responsible under § 1983.

436 U.S. at 694. In so holding, the Court expressly rejected the respondeat superior theory of liability for holding governmental entities liable for the unconstitutional actions of its nonpolicymaking employees. 436 U.S. at 694-95.

In developing the contours of governmental liability under § 1983 in subsequent cases, the Court consistently has adhered to *Monell*'s fundamental premise—that liability may be imposed on a governmental entity only for injuries caused by a government policy or custom. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In *Tuttle*, the Court held that a municipality could not be held liable for a single isolated incident of excessive force by a city police officer because there was no proof that the incident was caused by a municipal policy or custom.[2] 471 U.S. at 823-25. In so holding, the Court rejected

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[2] In *Tuttle*, the Court distinguished cases where a governmental entity could be held liable under § 1983 for an isolated unconstitutional act. In those cases, the unconstitutional act was an application of an unconstitutional policy which clearly mandated that application. 471 U.S. at 822. As examples, the Court compared *Monell*, where the policy at issue, by its terms, unconstitutionally compelled pregnant employees to take mandatory leaves of absence before such leaves were required for medical reasons, with *Tuttle*, where the policy at issue was the training of police officers which did not mandate the use of excessive force. 471 U.S. at 822-23. The Court stated that the causal link between the policy and the unconstitutional act in *Tuttle* (a shooting by a police officer) was far more nebulous and much further removed than the policy and act in *Monell*, and thus, the governmental entity in *Tuttle* could not be held liable for the single act, like the governmental entity in *Monell*. 471 U.S. at 822-24.

Here as in *Tuttle*, there is no express policy that mandates retaliation against persons who exercise First Amendment rights. To the contrary,

the trial court's jury instruction from which the jury could infer from the single use of excessive force that the action was attributable to inadequate training or supervision amounting to deliberate indifference chargeable to the entity.

> We think this inference unwarranted; first in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning that state of mind of the municipal policymakers . . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional, policy which policy can be attributed to a municipal policymaker.

471 U.S. at 821, 824. Thus, only from a series of past unconstitutional acts by nonpolicymaking subordinates is it permissible to infer that the entity was aware of such conduct and, through deliberate indifference, condoned and authorized future unconstitutional acts by its subordinates.

In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Court applied *Monell* to a 42 U.S.C. § 1983 action where the plaintiff alleged that his supervisors effected a job transfer and layoff in retaliation for his exercise of First Amendment rights. The Court held that, even if the plaintiff's allegations were true, the municipality could not be held liable under § 1983 unless its policy or custom caused the retaliatory actions through either (1) having a promulgated or articulated policy of retaliation or a practice of such retaliation, (2) authorizing the supervisors who transferred him to establish city policy

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Rutgers' regulations prohibit those making recommendations for the institution of dismissal proceedings from discriminating on the basis of "views on any subject," and further expressly provide that: "[T]he faculty member, as a private citizen, enjoys the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of those rights." (App. 236-237). Thus, like the government entity in *Tuttle*, Rutgers cannot be held liable for an isolated unconstitutional act allegedly committed by its nonpolicymaking subordinates.

with respect to transfers and layoffs, (3) expressly approving a policy statement of retaliation in which the supervisors cast their decision regarding the plaintiff, or (4) a series of past retaliatory actions by the supervisors which manifested an unconstitutional "custom or usage." 485 U.S. at 127-30. The plaintiff, having proved none of these, could not prevail in holding the city liable under § 1983. 485 U.S. at 129-30. The *Praprotnik* Court held that only if the authorized policymaker approved both the subordinate's decision and the unconstitutional basis for it could the entity be held liable. 485 U.S. at 127.

In *Canton v. Harris*, 489 U.S. 378, 385 (1989), the Court continued to adhere to the view that a governmental entity is only liable under § 1983 for unconstitutional acts it causes. The "deliberate indifference" standard of causation that this Court established in *Canton* provides that a governmental entity may be held liable under § 1983 only if it is deliberately indifferent to the constitutional rights of persons with whom its employees come into contact and the deliberate indifference actually causes the injury to those constitutional rights. 489 U.S. at 388-90. To make clear the narrow scope of governmental liability under this standard, the Court provided two examples which illustrate that a governmental entity is liable only when injury results because it ignored either a widespread pattern of unconstitutional violations committed by its employees or an obvious need to train its employees not to violate constitutional rights at the outset:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force [citation omitted] can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

489 U.S. at 390n.10; *see also* 489 U.S. at 396-97 (O'Connor, J., concurring).

The Third Circuit has rendered a decision that stands in clear conflict with the foregoing precedents of the Court. The Third Circuit has held that if any nondecisionmaking subordinate had an unarticulated retaliatory motive in recommending dismissal, the actual dismissal decision by the decisionmaking Board, even though based on independent fact findings after an evidentiary hearing by a separate hearing panel whose members admittedly had no retaliatory motive, is tainted thereby, if the decisionmaking Board did not fulfill a duty to "tread with a certain amount of care" as to Dr. San Filippo's assertions of isolated unconstitutional acts by nonpolicymaking subordinates. What is required to find that a governmental entity did "tread with a certain amount of care" is left undefined.

By so holding, the Third Circuit has created a new standard of governmental liability, for which only negligence is required and a causal relationship between the entity's policy or custom and the injury is not required. Its decision is in direct conflict with this Court's decisions requiring the entity's policy or custom to have caused the injury and requiring a custom to be established by a showing of deliberate indifference—not negligent indifference—to a pattern of conduct—not an isolated act—of nonpolicymaking subordinates.

The reasons that the Court stated in *Canton* for not permitting entity liability under 42 U.S.C. § 1983 absent deliberate indifference and causation provide equal reason for not permitting the Third Circuit decision to stand unreviewed:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City v. Tuttle*, [471 U.S.] at 823 (opinion of Rehnquist, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities—a result we rejected in *Monell*, 436 U.S. at 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism. *Cf. Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976).

489 U.S. at 391-92.

> § 1983 is not a "federal good government act" for municipalities. Rather it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights.
>
> Sensitive to these concerns, the Court's opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy under Monell.
>
> . . . .
>
> . . . . As the authors of the Ku Klux Klan Act themselves realized, the resources of local government are not inexhaustible.

489 U.S. at 396, 400 (O'Connor, J., concurring).

III. The Third Circuit holding that a First Amendment retaliatory discharge claim under 42 U.S.C. § 1983 does not require a public employee to show that a public employer decisionmaker acted with purposeful intent to retaliate against him for his exercise of First Amendment rights conflicts with the Court's precedent established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Connick v. Myers*, 461 U.S. 138 (1983), involves an important constitutional question, and involves an important issue affecting the public interest.

The court of appeals below held that Dr. San Filippo could establish his First Amendment retaliatory discharge claim against the members of the decisionmaking Board by a showing that the Board, in deciding to dismiss Dr. San Filippo on the basis of independent fact-findings made after 46 days of hearings before an independent hearing panel, failed to ' "tread with a certain amount of care" ' as to Dr. San Filippo's assertions to the Board that his department colleagues' recommendation that dismissal proceedings commence was motivated by Dr. San Filippo's First Amendment activities (App. 6, 44, 44n.26).

By so holding, the Third Circuit has thereby removed the purposeful intent element from a First Amendment retaliatory discharge claim and has substituted a negligence standard as the degree of culpability. Its decision stands in direct conflict with the Court's precedent establishing purposeful intent by the public employer decisionmaker to retaliate against the public employee for his exercise of First Amendment rights as the required degree of culpability.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court held that a public school board which stated that a school teacher's speech on matters of public concern was its express reason for firing him, violated his First Amendment

rights. The simple rationale is that a public employee does not forfeit his First Amendment rights as a citizen to speak on matters of public concern by virtue of his public employment. 391 U.S. at 568. However, a public school board does not forfeit its rights and responsibilities, as a government employer, to promote "the efficiency of the public services it performs through its employees." 391 U.S. at 568. *Pickering* thus prohibits a purposeful intent act: the dismissal of a public employee as punishment or in retaliation for his exercise of First Amendment rights. 391 U.S. at 563. *Pickering* does not impose upon a public school board, as an employer making employment decisions, a special duty to refrain from making adverse employment decisions for reasons other than protected activity as to its employees who incidentally may have engaged in First Amendment activities. *Pickering* does not provide that employees who engage in First Amendment activities are entitled to any different treatment or greater protection, as employees, than employees who have not engaged in First Amendment activities. No duty of care is created by *Pickering*.

Indeed, in a related context, the Court has held that the government does not violate First Amendment or Equal Protection guarantees by selectively prosecuting those who have engaged in wrongful conduct, even though such selective prosecution may incidentally impact First Amendment freedoms and the government is aware of that fact. *Wayte v. United States*, 470 U.S. 598, 610-12 (1985). The Court held that purposeful intent to prosecute for engaging in First Amendment activities is required:

> " 'Discriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." . . . In the present case, petitioner has not shown that the Government prosecuted him *because of*

> his protest activities. Absent such a showing, his claim of selective prosecution fails.

470 U.S. at 610 (emphasis by the Court; internal citations omitted).[3]

In *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 285-86 (1977), the Court specifically and expressly rejected a rule of causation that would accord to employees who have engaged in protected First Amendment activities greater protections against legitimately based adverse employment decisions. Thus, the *Mount Healthy* Court placed the burden of proof upon the public employee to establish the purposeful intent element of a First Amendment retaliatory discharge claim. 429 U.S. at 287. Under *Mount Healthy*, a public employee must prove both that he engaged in protected First Amendment activity and that the protected First Amendment activity was a "substantial" or "motivating" factor in the public school board's adverse employment decision. 429 U.S. at 287. Motivation bespeaks conscious and purposeful intent, not negligence.

The *Connick* Court iterated *Pickering*'s prohibition of a public employer's dismissal of an employee *in retaliation for* the employee's engaging in First Amendment activities. 461 U.S. at 146. *Connick* further held, in reliance upon *Pickering*, that when a public employer's discharge of a public employee is not based on that public employee's engaging in protected First Amendment activities, it is unnecessary for the courts to scrutinize the reasons for discharge. 461 U.S. at 146. Other-

---

[3] The selective prosecution analysis is directly applicable to this lawsuit. Dr. San Filippo's First Amendment claim actually is both a First Amendment and Equal Protection selective prosecution claim. The Third Circuit noted:

> The parties agree that the analysis is the same under the first amendment and equal protection claims. From this point, we refer to these claims as the first amendment claim.

(App. 13n.6).

wise stated, absent a discharge based on a public employee's engaging in protected First Amendment activities:

> [G]overnmental officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

461 U.S. at 146.

More recently, the Court's opinions in *Waters v. Churchill*, ___ U.S. ___, ___ S. Ct. ___, 128 L.Ed.2d 686 (1994), even though sharply divergent in other respects, reaffirmed the basic principle that purposeful intent is a necessary element of a First Amendment retaliatory discharge claim. As stated in the plurality opinion, the question is whether the public employee was "actually fired because of" protected First Amendment activities, *i.e.*, whether the public employer's "actual motivation" for the discharge was the public employee's protected First Amendment activities. 128 L.Ed.2d at 703 (Opinion of O'Connor, J.). Three other members of the *Waters* Court observed that purposeful intent remains the degree of culpability required to establish a First Amendment retaliatory discharge claim under the Court's precedent. 128 L.Ed.2d at 706 (Opinion of Scalia, J.). Two other members of the *Waters* Court stated: "A violation occurs when a public employee is fired *for* uttering speech on a matter of public concern. . . ." 128 L.Ed. 2d at 714 (Opinion of Stevens, J.) (emphasis added).

The Third Circuit misread, and misapplied to this case, other aspects of the *Waters* opinions. In *Waters*, the public employer acknowledged the reason for the public employee's discharge was her speech; the question was whether the speech was protected or unprotected under the First Amendment. Thus, in *Waters*, where speech was the basis of discharge, four members of the Court would impose upon the employer a duty to make inquiry as to whether the speech was protected or unprotected. Unlike the *Waters* case, Rutgers' Board discharged Dr. San Filippo for the nine acts of mis-

conduct articulated in its written decision, none of which involved First Amendment activities, protected or unprotected. Thus, the Third Circuit has applied the phrase "tread with a certain amount of care" out of context. The precise use of the phrase in the plurality opinion of Justice O'Connor in *Waters* was:

> If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there was a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care.

128 L.Ed.2d at 701.

Contrary to the Court's holdings that a First Amendment retaliatory discharge claim requires a showing that the public employer discharged a public employee with the purposeful intent to retaliate against the public employee because he engaged in protected First Amendment activities, the Third Circuit has imposed a special duty of care that the public employer decisionmaker must fulfill before it can fire an employee for wrongful conduct that is not constitutionally protected.

In the Third Circuit's view, it was not enough that the Board, which actually decided to fire Dr. San Filippo, stated its legitimate reasons therefor in a 60-page decision that was based upon independent fact findings made by an independent hearing panel after 46 days of hearings. It was also not enough that formal dismissal charges were not brought by Rutgers' President until, pursuant to Rutgers' regulations, recommendations for the commencement of dismissal proceedings were made separately by three academic officers and two faculty groups (only one of which was Dr. San Filippo's purportedly ill-motivated department). It was also not enough that not one of the recommendations, charges, or decisions stated or implied that Dr. San Filippo should be dismissed, or that dismissal proceedings should be brought, due to his

alleged First Amendment activities. Rather, the Third Circuit held that once Dr. San Filippo asserted that his department colleagues were motivated by his First Amendment activities in recommending that dismissal proceedings be commenced, the decisionmaking Board was required to do more, *i.e.*, "tread with a certain amount of care." Precisely what more the Board could or should have done remains unspecified.

The decision below provides serious concern to all public employers in the Third Circuit. The amorphous parameters of the special duty imposed by the Third Circuit conjures up a host of potential horrors. A public employer must be prepared to pay for the costly defense through trial of a 42 U.S.C. § 1983 lawsuit whenever it decides, for legitimate reasons, to dismiss an employee who has incidentally engaged in the past in First Amendment activities. Or a public employer must undertake the costly task of leaving no stone unturned in ferreting out the possibility that a nondecisionmaking subordinate may have an unarticulated, unconstitutional motive in seeking a colleague's dismissal. The Third Circuit decision effectively accords a public employee, who has ever engaged in First Amendment activities by design or fortuity, a virtual shield from an adverse employment decision for legitimate reasons.

The big loser if the Third Circuit's decision is allowed to stand is the public that the public entity serves.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on the three questions presented.

Respectfully submitted,

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November 1994

Supreme Court, U.S.
FILED

No. ____

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(2)

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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November 1994

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5658

JOSEPH SAN FILIPPO, JR.

Appellant

v.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADREIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, RUTGERS UNIVERSITY

Appellees

RUTGERS COUNCIL OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Amicus Curiae

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-2575)

Present: BECKER AND LEWIS, Circuit Judges
and POLLAK, District Judge*.

---

* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 13, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 30, 1993, be, and the same is hereby affirmed with respect to the District Court's grant of summary judgment in Rutgers University's favor on Joseph San Filippo, Jr.'s due process claim. The District Court's grant of summary judgment in Rutgers University's favor on Joseph San Filippo, Jr.'s first amendment claim is vacated. The cause is remanded to the District Court for proceedings consistent with the opinion of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK
Clerk

Dated: July 21, 1994

Certified as a true copy and issued in lieu of
a formal amndate [sic] on August 26, 1994.

Teste: /s/ P. DOUGLAS SISK

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B

Filed July 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5658

JOSEPH SAN FILIPPO, JR.

Appellant

v.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADREIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, RUTGERS UNIVERSITY

Appellees

RUTGERS COUNCIL OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Amicus Curiae

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-2575)

Argued: May 13, 1994

Before: BECKER AND LEWIS, Circuit Judges
and POLLAK, District Judge*.

(Filed July 21, 1994)

---

*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

POLLAK, *District Judge*.

This case, brought under 42 U.S.C. §1983, arises out of the dismissal by Rutgers University — New Jersey's principal state institution of higher education — of plaintiff Dr. Joseph San Filippo, who was, until May 13, 1988, a tenured professor of chemistry. The defendants named in this case are Rutgers University and six members of the Rutgers Board of Governors (hereinafter collectively described as "Rutgers"). The district court granted Rutgers' motion for summary judgment and dismissed Professor San Filippo's case.

On appeal, San Filippo, with support from the Rutgers Council of American Association of University Professors Chapters ("Rutgers AAUP") as amicus, challenges the district court's grant of summary judgment in Rutgers' favor: (1) on San Filippo's claim that he was dismissed in

retaliation for the exercise of his first amendment rights, and (2) on San Filippo's claim that Rutgers violated his right to procedural due process, because the panel that recommended his dismissal had, according to San Filippo, a financial incentive to recommend dismissal.

Part I of this opinion outlines the factual background and procedural history of this case. Part II analyzes the legal issues posed by San Filippo's first amendment claim. Part III addresses San Filippo's due process claim.

I. Factual background and procedural history

Because San Filippo appeals from the district court's grant of Rutgers' motion for summary judgment, the following factual recital accepts as true all evidence proffered by non-movant San Filippo, with all reasonable inferences drawn in his favor.

On November 25, 1985, Dean Tilden Edelstein told San Filippo and his Rutgers AAUP counsellor, Wells Keddie,[1] of allegations that San Filippo had harassed, exploited and attempted to exploit visiting scholars from the People's Republic of China. On January 6, 1986, Dean Edelstein sent San Filippo a letter stating the complaints against him. As required by one of the University's dismissal regulations, advice about whether dismissal proceedings should be commenced was sought from two groups of San Filippo's faculty peers and three academic officers of the University. On February 14, 1986, the tenured faculty members of the chemistry department passed a resolution concluding that the charges against San Filippo, if proven, represented grounds for dismissal. After the Appointments and Promotion Committee, the University Provost, and the Chief Academic Officer concurred in the sentiment expressed in that resolution, Rutgers University President Edward Bloustein wrote a letter to San Filippo, dated October 1, 1986, in which he described the formal charges

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1. The Rutgers AAUP is the recognized agent for collective bargaining under state law for Rutgers University faculty members, including Professor San Filippo. The Rutgers AAUP, as an affiliate of the national organization, also serves as a professional organization for the Rutgers University faculty.

against San Filippo. President Bloustein further indicated that, if San Filippo did not make a timely request for a hearing, President Bloustein would recommend to the University's Board of Governors that San Filippo be dismissed based on the charges outlined in the letter.

San Filippo exercised his right to a hearing before a panel of five faculty peers (the "Senate Panel") which, after a forty-six day hearing, concluded that San Filippo had committed almost all of the offenses charged. In a forty-four page report, issued on December 21, 1987, the Senate Panel recommended that San Filippo be stripped of his tenure and dismissed from the University. The Board of Governors unanimously concluded in its sixty-page opinion that the Senate Panel's findings were supported by the evidence. On May 13, 1988, the Board of Governors voted to dismiss San Filippo on the basis of nine charges of misconduct. One member of the seven-member Board — Walter Wechsler — voted against dismissal because he believed that the sanction was too severe; Wechsler has not been named as a defendant.

San Filippo filed the instant action on June 13, 1988. He alleges, among other things, that disciplinary proceedings were initiated against him and that he was dismissed in retaliation for the numerous (1) grievances and lawsuits he had instituted, and (2) complaints he had voiced, against Rutgers University and various University officials between 1977 and 1986 — activities that he contends are protected by the first amendment.

A. *San Filippo's alleged protected activities*

In 1977, San Filippo wrote a letter to the then chemistry department chairman, Professor Sidney Toby, complaining about dangerous conditions in the chemistry laboratories, conditions that had been described by the New Jersey Department of Health as "generally unsatisfactory." In 1979, in response to a newspaper reporter's questions concerning a student's collapse due to noxious fumes during a chemistry experiment, San Filippo stated — as reported by the newspaper on January 30, 1979 — that undergraduate students were being subjected to a "health hazard and an absolute danger" and that "minimum safety

requirements are not being met." San Filippo was berated by the then department chairman, Professor Joseph Potenza, and by an administrator for making these comments. San Filippo's comments led to the creation of an American Association of University Professors — University Safety Committee.

In 1977 and 1978, San Filippo testified before a grand jury regarding an investigation into the manufacture of illegal drugs in the chemistry laboratories. Potenza criticized San Filippo for his "disloyalty" and for "washing the department's dirty linen in public."

In 1983-84, San Filippo became embroiled in a dispute over what he describes as an effort by members of the chemistry department's instruments committee to obtain federal funding for a mass spectrometer by misrepresenting the department's need for such an instrument. San Filippo threatened to tell the federal funding agency the truth about the department's needs. The committee members wrote a memorandum to Potenza, as department chairman, protesting San Filippo's threats to undermine their efforts to obtain a mass spectrometer. Potenza told San Filippo that he intended to place the memorandum in San Filippo's personnel file. San Filippo contacted the United States Attorney's office regarding this action against him, and an Assistant United States Attorney told San Filippo that such an action would be characterized as an effort to obstruct justice. After San Filippo told Potenza what the government lawyer had said, Potenza had the letter of reprimand removed from San Filippo's personnel file.

Between 1979 and 1986, San Filippo complained about certain financial irregularities in the chemistry department, particularly efforts to divert funds from San Filippo's federal grants. In October 1985, San Filippo objected to a proposal by the new department chairman, Professor Robert Boikess, to impose a "shop-user's fee," which San Filippo characterized as illegal double billing of chemistry department members.

In 1981, the chemistry department declined to recommend San Filippo for promotion to full professorship. San Filippo filed a grievance in 1982, contending that he

had been denied promotion through manipulation of his promotion packet. While this grievance was pending, the chemistry department recommended that San Filippo be promoted to full professor, effective July 1984. Although the grievance committee ultimately agreed with San Filippo that he should have been promoted, the University took the position that the issue was moot. In September 1985, San Filippo filed a lawsuit in state court in which he contended that he was entitled to have his promotion effective July 1982. That suit is still pending.

In 1984, San Filippo grieved the fact that he had been denied a merit salary increase. The University rejected San Filippo's grievance, and he filed for non-binding arbitration. The first hearings in the arbitration occurred in October 1985. On September 10, 1986, Boikess testified for the University. Regarding this event, the arbitrator commented in his decision dated December 26, 1986:

> Little things are often very revealing. A transcript does not convey the full flavor of what transpires in the hearing room. Boikess was called on the last day of the hearing. He brought his own lawyer with him (Mr. Peirano).
>
> San Filippo cordially greeted him before he took the stand. Boikess would not acknowledge the greeting and refused to acknowledge grievant's presence in the room.
>
> During his testimony, Boikess kept referring to grievant's "self-nomination" [for the merit salary award]. His tone of voice was so caustic that it sparked an inquiry from me. (The inference to be drawn by the tone of voice employed was that a "self-nomination" was somehow less worthy).
>
> I specifically asked Boikess why he emphasized "self-nomination." Boikess danced around the issue and did not really answer my question. It became obvious that he would not answer, so I gave up. Further, the tenor and tone of his testimony revealed his near-total contempt for San Filippo.
>
> I note in passing that most of the persons being considered were self-nominated. The [merit salary award procedure] specifically provides for same.

> One would have to be a block of wood to fail to notice Dr. Bolkess' complete distaste for Joe San Filippo.

(A.1155 n.21). The arbitrator sustained San Filippo's complaint. He further noted in his opinion:

> San Filippo testified, without contradiction, that he was criticized by administration officials for talking to the school newspaper about unsafe conditions in the laboratories. [San Filippo] was chairman of the Safety Committee at the time. A student took ill. [San Filippo] was accused of being "disloyal." Putting aside the serious first amendment issues the episode raises (*Pickering v. Board of Education*, 391 U.S. 563), it seems to me that the danger to the health of the students outweighs any possible harm to the reputation of those in authority that disclosure of lab conditions might have created. Further, there is a difference to [sic] loyalty to the institution and the purposes it is supposed to serve and fealty to the individuals who may, at any given moment, occupy positions of higher authority in the organization. Which is more important in the scheme of things: bruised feelings because the teacher is tough and demanding or personal safety? . . .
>
> While not directly at issue, there was some unsettling evidence that [Dr. San Filippo's] promotion packet had been surreptitiously removed and unfavorable material secretly inserted. [Dr. San Filippo] had to bring successful grievance action to rectify the situation. It would appear that someone was willing to go to extraordinary lengths to deny [Dr. San Filippo] professional advantage. That kind of conduct is similar to what happened to [Dr. San Filippo] in the [merit salary award] review.
>
> [Dr. San Filippo's] nomination was clearly judged under separate "San Filippo rules" that were applicable to no one else.
>
> . . . . I know a pipe job when I see one.

(A.1161 n.29).

In November 1985, Dr. San Filippo brought a libel action in state court against three administrators who accused San Filippo of deliberately falsifying time reports relating to one of his technical assistants.

Finally, San Filippo brought a lawsuit in state court against the University in March 1986 complaining about, among other things, the University's decision to prohibit — without a hearing of any kind — graduate student assistance in San Filippo's research program, because of the accusations against San Filippo.

B. *The charges and proceedings against San Filippo*

As explained above, on October 1, 1986, President Bloustein brought formal written charges against San Filippo. After a hearing before the Senate Panel, which recommended dismissal, the Board of Governors, which reviewed the findings of the Senate Panel for sufficiency of the evidence, concurred in the Senate Panel's findings sustaining the following charges:

> *Charge 1*: Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required by all faculty members. More specifically, your treatment with respect to these individuals, as set forth more fully in the attached documents, is as follows:
>
> a. You took advantage of your professorial position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.[2]
>
> c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage to either Mr. Gao or Mr. Xiao.

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2. The Senate Panel found that charge 1(b) was unproven, and the Board concurred in this determination.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

Charge 2: On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

Charge 3: You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:[3]

b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time reports for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.[4]

Charge 4: You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-

3. The Senate Panel did not sustain charge 3(a), and the Board concurred in this determination.

4. Charge 3(c) was not sustained by the Panel, and the Board concurred in this determination.

doctoral fellows Chinese scholars you knew did not have appropriate credentials and by charging stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.[5]

Charge 5: During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4 above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of the fact and did not make it known when you submitted the letter.

Charge 6: On December 16, 1985, Professor Robert Bolkess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Cong-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in your laboratory.

In the Board's opinion, the Board specifically found that the conduct described in sustained charges 1(a), 1(d) and 1(e) was a serious enough breach of the role of faculty member that, even if those were the only sustained charges, there would be sufficient cause for dismissal. Accordingly, on May 13, 1988, the Board directed that San Filippo be dismissed from the University.

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5. The Senate Panel sustained this charge in regard to Mr. Peng Zhou, but not in regard to Mr. Cong-Yuan Guo. The Board concurred in both determinations.

Board member Wechsler agreed with his colleagues' findings but felt that dismissal was too severe a sanction: "Because this punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus, I respectfully dissent." (A.322).

C. *The procedural history of this case*

On June 13, 1988, San Filippo filed this suit against the University and the six Board members who voted in favor of his dismissal. San Filippo sued under §1983 and state law, alleging that the dismissal violated his speech, petition, equal protection, and due process rights under the United States and New Jersey Constitutions, and violated his common law contract rights.

Following the parties' cross-motions for summary judgment on a number of issues, the district court granted San Filippo's motion for partial summary judgment on his claim that the regulations pursuant to which he was dismissed were void for vagueness. *San Filippo v. Bongiovanni*, 743 F. Supp. 327 (D.N.J. 1990). The void-for-vagueness issue was certified for interlocutory appeal to this court; we reversed and remanded the case for further proceedings. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1139-40 (3d Cir. 1992). After the Supreme Court denied San Filippo's petition for certiorari, *San Filippo v. Bongiovanni*, 113 S. Ct. 305 (1992), the district court referred the remaining summary judgment motions to a magistrate judge.

In his Report and Recommendation, the magistrate judge recommended that summary judgment be granted in defendants' favor on San Filippo's procedural due process claim and on his state law claims, but that summary judgment be denied on San Filippo's first amendment/equal protection claim.[6] Regarding the first amendment claim, the magistrate judge first explained that this circuit uses a three-part test to assess a public employee's claim of retaliation for having engaged in a

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6. The parties agree that the analysis is the same under the first amendment and equal protection claims. From this point, we refer to these claims as the first amendment claim.

protected activity. First, plaintiff must show that he engaged in a protected activity. Second, plaintiff must show that the protected activity was a substantial factor motivating the dismissal decision. Finally, defendant may defeat plaintiff's claim by demonstrating that the same action would have taken place even in the absence of the protected conduct.[7] *See Holder v. City of Allentown*, 987 F.2d 188, 194 (3d. Cir. 1993); *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983) (citing *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 283-87 (1977)).

With respect to the first prong of this test, the magistrate judge concluded that, unlike speech generally — which is protected under the first amendment only if it addresses a matter of public concern — San Filippo's lawsuits and grievances were activities protected under the petition clause of the first amendment regardless of whether they addressed matters of public concern. The magistrate judge then noted that a fact-finder could reasonably infer that San Filippo's protected conduct was a substantial factor motivating the decision to dismiss him from the University. Finally, the magistrate judge recommended that San Filippo be given the chance to conduct additional discovery in order to rebut Rutgers' claim that San Filippo would have been dismissed even in the absence of his protected activities. Because the magistrate judge believed that the defendants had not yet made relevant discovery material available to San Filippo, the magistrate judge recommended that summary judgment be denied under Rule 56(f) of the Federal Rules of Civil Procedure.[8]

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7. The burden of persuasion shifts to Rutgers with respect to the third prong of this test. In this respect, the retaliatory discharge test differs from the Title VII rule established in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and reaffirmed in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), where the burden of persuasion remains on the plaintiff even after he or she has proved a prima facie case, and the employer need only articulate — not prove — a non-discriminatory reason for its actions.

8. Rule 56(f) states in relevant part:

> Should it appear from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit . . . discovery to be had or may make such other order as is just.

San Filippo did not object to the magistrate judge's recommendation that Rutgers be granted summary judgment on the state law claims. Accordingly, in an opinion dated September 28, 1993, the district court accepted those recommendations and granted Rutgers summary judgment on those claims. San Filippo objected to the magistrate judge's recommendation that Rutgers be granted summary judgment on his due process claim, and argued that he was entitled to summary judgment on that claim or at least to further discovery. Rutgers objected to the magistrate judge's recommendation that summary judgment on San Filippo's first amendment claim be denied.

The district court adopted the magistrate judge's recommendation that summary judgment be granted on San Filippo's due process claim, but rejected the magistrate judge's recommendation that summary judgment be denied on San Filippo's first amendment claim. With respect to the first amendment claim, the district court first disagreed with the magistrate judge's conclusion that San Filippo's lawsuits and grievances were activities protected under the first amendment petition clause regardless of whether they addressed a matter of public concern. Instead, the district court held that lawsuits and grievances, like speech generally, are protected activities under the first amendment only if they address matters of public concern.

The district court concluded that some of San Filippo's speech addressed matters of public concern and was therefore protected under the first amendment. The district court also concluded that a fact-finder could reasonably infer that San Filippo's protected conduct was a substantial factor motivating his dismissal. However, the district court held that there was no basis in the record from which a fact-finder could reasonably conclude that San Filippo was dismissed because of his protected conduct, rather than because of the misconduct described in the charges brought against him. Moreover, the district court rejected the magistrate judge's recommendation that a ruling on the summary judgment motion be delayed until after San Filippo had had an opportunity to conduct additional discovery, and instead held that San Filippo had received

all discovery to which he was entitled. Accordingly, the district court held that Rutgers was entitled to summary judgment on San Filippo's first amendment claim as well as on his due process and state law claims, and dismissed San Filippo's complaint in its entirety.

On appeal, San Filippo argues that the district court's order granting Rutgers summary judgment on his first amendment claim should be vacated because the district court erred, (a) in granting Rutgers' motion for summary judgment without affording him an opportunity to take additional discovery, and (b) on the merits. San Filippo also contends that the district court's order granting Rutgers summary judgment on his due process claim should be vacated because there remains a material issue of fact regarding the question whether the Senate Panel had a pecuniary interest in the outcome of the proceedings against San Filippo, and because he was entitled to additional discovery.

II. San Filippo's first amendment claim

San Filippo first contends that the district court erred in denying his request, made pursuant to Rule 56(f) of the Federal Rules of Civil Procedure,[9] that the district court delay its ruling on Rutgers' summary judgment motion until after he had time to conduct further discovery. San Filippo made various discovery requests on September 7, 1989; Rutgers asked to have until November 7 to respond. On November 24, San Filippo wrote a 20-page letter to Rutgers pointing out inadequacies in Rutgers' response. On November 29, Rutgers moved for summary judgment and the requested information was never supplied. San Filippo submitted a Rule 56(f) affidavit in support of its opposition to Rutgers' motion for summary judgment. The magistrate judge recommended that the ruling on the summary judgment motion be deferred until after San Filippo had an opportunity to take additional discovery.

The district court rejected the magistrate judge's conclusion that summary judgment should not be granted until San Filippo had an opportunity to discover additional

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9. The text of this rule is quoted at note 8, *supra*.

information. The court explained that San Filippo argued that "he must see the records of other faculty persons similarly situated (*i.e.*, persons who have been known to commit, or were accused of committing, similar offenses, but against whom no sanctions, or not as severe a sanction was imposed)." Opinion at 42 (internal quotation omitted). The court rejected San Filippo's argument for two reasons. First, the court concluded that "faculty members 'similarly situated' to plaintiff are those faculty members against whom formal charges have been filed as to conduct which could lead to dismissal under the University's regulations." Opinion at 42-43. The court explained that San Filippo received all such information on June 9, 1989, pursuant to Rutgers' compliance with section I.1 of a Stipulation dated May 19, 1989. Second, the court concluded:

> These [nine] charges *together* caused plaintiff's dismissal and it is only that tenured faculty member who had "been known to commit" or was "accused of committing" offenses of the kind, number, and scope *taken together* with whom plaintiff is truly "similarly situated." No one suggests that such a person exists.

Opinion at 44-45 (emphasis in original). For these two reasons, the court concluded that San Filippo had received all of the discovery to which he was entitled. *See* Opinion at 46.

San Filippo, with support from the Rutgers AAUP, argues that the district court abused its discretion in denying San Filippo's request for a Rule 56(f) continuance. Under *Contractors Assoc. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991), whether a Rule 56(f) motion should be granted "depends, in part, on 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained.'" *Id.* at 1266 (quoting *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989)). A district court has discretion in acting on Rule 56(f) motions. *See id.* at 1267. However, where relevant information sought is in the hands of the moving party, "a district court should grant a Rule 56(f) motion almost as a matter of course unless the information is otherwise available to the non-movant." *Id.*

In *Contractors Assoc.*, the district court granted Contractors Association of Eastern Philadelphia and other trade associations summary judgment on their claim that Philadelphia's public contract minority set-aside law violated the equal protection clause of the fourteenth amendment. On appeal, United Minority Associates Enterprises argued that the district court — to which Minority Associates had submitted a Rule 56(f) affidavit along with their opposition to summary judgment — erred by granting the summary judgment motion without giving Minority Associates an opportunity to pursue discovery on the existence of discrimination in the Philadelphia construction market that could justify various set-asides. We held that the district court abused its discretion by not granting a continuance before ruling on the summary judgment motion. *See Contractors Assoc.*, 945 F.2d at 1268.

In addressing the first part of the *Contractors Assoc.* test — what information is sought and how it would preclude summary judgment — San Filippo and the Rutgers AAUP argue that the district court's definition of "similarly situated" was too narrow. We agree. Among other things, San Filippo argues that, but for his protected activity, he would not have been charged at all. To limit his discovery to individuals who were in fact brought up on similar charges is, therefore, not adequately responsive to San Filippo's needs. Nor should San Filippo be limited to discovery of individuals who committed nine charges of comparable seriousness yet were not disciplined. The Supreme Court explained in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976):

> [P]recise equivalence in culpability between employees is not the question. As we indicated in [*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)], an allegation that other "employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.

Santa Fe, 427 U.S. at 283 n.11 (emphasis and omissions in *Santa Fe*).

In analogous fashion, this court, in *Bennun v. Rutgers State University*, 941 F.2d 154 (3d Cir. 1991), rejected a contention that the district court had erred in comparing the defendant University's decision not to tenure the plaintiff professor with the University's decision to tenure another professor who had higher ratings than the plaintiff in two categories — teaching effectiveness and general usefulness. *See id.* at 178. We reasoned that to preclude such a comparison "would change 'similarly situated' to 'identically situated.'" *Id.* Although "[t]he propriety of such a comparison is case specific," there is a "broad sweep of relevancy." *Id.* Admittedly, the district court may and should impose limits on discovery that is calculated to lead to the unearthing of only marginally relevant evidence. Nonetheless, the limits imposed here were too severe.

The Board indicated in its opinion that it viewed charges 1(a), 1(d) and 1(e) as the most serious charges against San Filippo, meriting his dismissal even if the other charges were not sustained. San Filippo accordingly should be permitted to discover whether the University knew of other employees who committed one or more offenses of comparable or greater seriousness yet did not discipline these employees, or imposed sanctions far less severe than dismissal. Although the district court's suggestion that San Filippo was disciplined because of a combination of misdeeds rather than for any single misdeed is plausible, this type of evaluation is one that should generally be left to the fact-finder. Because the information San Filippo sought in discovery was of the sort that might prevent the entry of summary judgment and was under the control of Rutgers, we conclude that it was an abuse of discretion to deny San Filippo's Rule 56(f) motion. Accordingly, we will vacate the district court's grant of summary judgment on San Filippo's first amendment claim and remand for further discovery.[10]

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10. With respect to the second part of the *Contractors Assoc.* test — why the information was not previously obtained — Rutgers argues that the May 19, 1989 Stipulation precluded further discovery. This argument is unpersuasive. We agree with the district court's conclusion that the Stipulation did not necessarily foreclose additional discovery.

Even without further discovery, there is sufficient evidence in the record from which a fact-finder could conclude that, in the absence of his protected activities, San Filippo would not have been dismissed based on the conduct described in the charges against him. First, Dean Edelstein was interviewed by the local New Brunswick newspaper, *The Home News*, shortly after San Filippo was dismissed. The paper reported: " 'If [San Filippo] had behaved better earlier in terms of his relations with his colleagues,' said Tilden Edelstein, Dean of the Faculty of Arts and Sciences, San Filippo might have been treated differently. . . . 'But San Filippo persisted in being "Joe the Warrior," ' Edelstein said." (A.606). A fact-finder could reasonably infer that the "war" to which Dean Edelstein referred encompassed the protected complaints San Filippo had made over the years. In addition, Walter Wechsler, the member of the Board of Governors who dissented from the decision to dismiss San Filippo, stated that "the punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus." (A.322).

San Filippo also has presented evidence that other faculty members had committed infractions of comparable seriousness yet had not been punished. For example, Professor Richard Hartwick of the chemistry department testified before the Senate Panel that he had had two students pitch hay for him on his farm. Another professor, George Muha, testified that, as a student, he had helped his faculty advisor move from one place to another. Professor Muha also testified that he had some of his own students work with him in his photography lab, and that foreign students he had invited to his house at Thanksgiving did domestic chores including yard work for him. Based on this evidence, a fact-finder could reasonably find that San Filippo would not have been dismissed in the absence of his protected activities. Accordingly, even if the denial of the Rule 56(f) motion were not erroneous, we would vacate the grant of summary judgment.

In light of our decision to vacate the district court's grant of summary judgment on San Filippo's first amendment claim, we need to address certain other issues that are relevant to the course of proceedings on remand.

A. *Protected activity*

As explained above, one who alleges retaliatory discharge from governmental employment must establish that the conduct which triggered the discharge was protected under the first amendment. Where the alleged retaliation is based on expressive conduct constituting speech, a court must first determine whether or not the speech can be fairly characterized as addressing a "matter of public concern," for a governmental employee who makes public complaints about problems not of "public concern" has no first amendment immunity against employer discipline. *Connick v. Myers*, 461 U.S. 138, 147 (1983).[11] But San Filippo's expressive conduct was not limited to speech. It included the filing both of lawsuits, and also of grievances under a collective bargaining agreement, against the University and University officials — activities that implicate the petition clause, rather than the free speech clause, of the first amendment.[12]

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11. A public employer is not precluded altogether from dismissing an employer for speech addressing a matter of public concern. Rather, a public employer may dismiss an employee for speech addressing a matter of public concern if the state's interest, as an employer, in promoting the efficiency of its operations outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. *Connick*, 461 U.S. at 142. This balancing test comes into play only if the public employer concedes that it dismissed an employee because of the employee's protected speech but contends that it was justified in doing so. Rutgers denies that it dismissed San Filippo for his protected activities; accordingly, the balancing test has no application in the case at bar.

The court decides, as a matter of law, whether the speech at issue addressed a matter of public concern and whether the state's interest in efficiency outweighed the employee's interest in commenting on matters of public concern. *See Holder v. City of Allentown*, 987 F.2d 188, 195 n.2 (3d Cir. 1993).

12. The first amendment states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amend. 1.

The magistrate judge concluded that San Filippo's activities implicating the petition clause were protected by the first amendment regardless of whether the "petition" at issue addressed a matter of public concern. The district court disagreed, and held that, to qualify for first amendment protection, San Filippo's "petition" activities must meet the *Connick* "public concern" threshold. Although the district court concluded that some of San Filippo's speech addressed matters of public concern,[13] the court concluded that his lawsuits and grievances did not meet that threshold.

On appeal, San Filippo and the Rutgers AAUP recognize that the right to petition, like freedom of speech, is not absolute. They argue that San Filippo's lawsuits and grievances were protected first amendment activities, regardless of content, unless they were baseless. Rutgers contends that the district court correctly held that San Filippo's lawsuits and grievances were protected under the petition clause only if they addressed matters of public concern.[14]

In *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990), we expressly declined to reach the question whether a public employee is protected under the petition clause against retaliation for having filed a petition

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13. The district court concluded that the following items of speech addressed matters of public concern: (1) San Filippo's 1979 statement in a school newspaper criticizing Rutgers for inadequate ventilation in the chemistry labs; (2) San Filippo's testimony, in 1977 and 1978, before a grand jury, regarding an investigation into the manufacture of illegal drugs in Rutgers' laboratories; (3) San Filippo's criticisms, in 1983-84, of his faculty peers' attempt to secure funding for a mass spectrometer by deceiving federal funding agencies; and (4) San Filippo's disputes between 1979 and 1986 with senior members of his department over their efforts to obtain "inappropriate percentages" of his federal grants.

14. The district court's conclusion that San Filippo engaged in some protected activity does not make this dispute academic. San Filippo wants, (a) the fact-finder to be instructed that dismissal in retaliation for any or all of his lawsuits and grievances constitutes a first amendment violation, and (b) to argue to the fact-finder that the close proximity in time between his 1985 lawsuits and the decision to file formal charges against him supports an inference of retaliation.

addressing solely a matter of private concern. *See id.* at 1076. We now will address that question.

Although the Supreme Court has not discussed the scope of the constitutional right to petition in the context of an allegedly retaliatory discharge of a public employee, the Court has had occasion to consider the scope of that right in other contexts.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court addressed the question whether a publicity campaign by railroads intended to encourage legislation and law enforcement practices disadvantageous to the trucking industry violated the Sherman Act. First, the Court took note of the established principle that, if a restraint of trade is caused by otherwise valid governmental action, there is no Sherman Act violation. *See id.* at 135-36. Then, the Court went on to hold that the Sherman Act does not prohibit two or more persons from working together in an attempt to persuade the government to take a particular action that would restrain trade. *See id.* at 136. The Court based its decision upon two grounds. First, the Court reasoned that nothing in the legislative history of the Sherman Act indicated an intent to regulate political activity by narrowing the channels through which citizens communicate with their governing officials. *See id.* at 137. The Court then added:

> Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. Moreover, the Court rejected the contention that there was a Sherman Act violation because the railroads' purpose was to destroy the truckers as competitors:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the

> application of the Sherman Act would be justified. But this is certainly not the case here. No one denied that the railroads were making a genuine effort to influence legislation and law enforcement practices.

Id. at 144. *Accord, United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).[15]

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court developed the "mere sham" exception to petition clause protection suggested in the *Noerr* dictum. Competitors of highway carriers regularly brought administrative and judicial proceedings to challenge the carriers' applications for operating rights. The highway carriers filed a complaint alleging that their competitors conspired to monopolize trade by instituting actions before administrative agencies and courts to defeat the carriers' applications to acquire operating rights. *See id.* at 509. The complaint further alleged that the competitors instituted the proceedings to oppose the carriers' applications without regard to the merits of the cases, in an effort to prevent the carriers from having meaningful access to the agencies and courts. *See id.* at 511. The Supreme Court held that the district court improperly dismissed the complaint for failure to state a claim under the antitrust laws. The Court first reiterated the holding in *Noerr* that "no cause of action [is] alleged insofar as it [is] predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement." *Id.* at 510. The Court further stated:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. The right of access to the courts is indeed but one aspect of the right of petition.

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15. In *Pennington*, coal operators and a labor union had approached the Secretary of Labor and the Tennessee Valley Association regarding the minimum wage for contractors selling coal to the TVA. The Court reaffirmed the holding of *Noerr* that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

Id. at 510-11 (citations omitted). Nonetheless, the Court held that the conduct described in the carriers' complaint fell within the "sham" litigation exception described in *Noerr* and thus stated a claim under the antitrust laws.

The unprotected status of "sham litigation" was again recognized in *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731 (1983), in which the Court announced that "baseless litigation is not immunized by the First Amendment right to petition." *Id.* at 743. In *Bill Johnson's Restaurants*, a waitress who was fired filed an unfair labor practice charge. She and other waitresses also picketed the restaurant, which in turn filed a complaint in state court seeking both damages and an injunction against the picketing. The waitress then filed a second charge with the Board, alleging that the restaurant had filed the state action in retaliation for her exercise of rights under the National Labor Relations Act and seeking to have the restaurant's state action enjoined. The Board issued a cease-and-desist order to halt the allegedly retaliatory state court lawsuit, and the Ninth Circuit affirmed.

The issue before the Supreme Court was whether, under section 8 of the NLRA, the Board may issue a cease-and-desist order to halt a state court suit solely upon a showing that the suit was filed for a retaliatory purpose, or whether the suit must also lack merit. The Court recognized that the Board's position — that the suit need only be filed for a retaliatory purpose — found support in the broad remedial provisions of the Act. However, the Court concluded:

> There are weighty countervailing considerations . . . that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution. In *California Motor Transport*, we

> recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. We should be sensitive to these First Amendment values in construing the NLRA in the present context.

Id. at 741 (citations omitted). The Court held that suits lacking a reasonable basis do not fall within the scope of first amendment protection. The Court explained:

> The first amendment interests involved in private litigation — compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts — are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.

Id. at 743 (internal quotation omitted). Accordingly, the Court concluded that it is an enjoinable labor practice under §8 of the NLRA to file a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by the NLRA. *See id.*[16]

In both *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979) (per curiam) and *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 284 (1984), the Court held that the petition clause does not require the government to respond to every communication that the

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16. Following *Bill Johnson's Restaurants* in *Hoeber on behalf of the NLRB v. Local 30*, 939 F.2d 118 (3d Cir. 1991), this court held that the district court properly denied the NLRB's request that the court enjoin a pending lawsuit brought by a labor union for breach of contract. We explained that two factors must be present before an injunction against a civil lawsuit may issue: the plaintiff must have an improper motive for bringing the suit, and the suit must have no reasonable basis. *See Hoeber*, 939 F.2d at 126.

communicator may denominate a petition. In *Smith*, the Arkansas State Highway Commission refused to consider grievances filed by a union on behalf of employees, and would respond only to grievances filed by individual employees themselves. In *Knight*, a state statute required public employers to respond to union representatives, but not to individual employees. In both cases, the Court held that there was no petition clause violation. The *Knight* Court, which described the challenged conduct as the converse of conduct challenged in *Smith*, rejected the employees' claim that "they have a right to force officers of the State acting in an official policy-making capacity to listen to them in a particular formal setting." *Knight*, 465 U.S. at 282.

Most recently, in *McDonald v. Smith*, 472 U.S. 479 (1985), the Court addressed the question whether the petition clause provides absolute immunity to a defendant charged with defaming the plaintiff in a letter about the plaintiff written to the President of the United States. Smith, an unsuccessful aspirant for appointment as United States Attorney, brought a libel suit against McDonald, alleging that McDonald had written two letters to Ronald Reagan — the first when Mr. Reagan was President-elect, the second a month after his inauguration — accusing Smith of, among other things, fraud, extortion, and civil rights violations. The Court held that the petition clause does not provide absolute immunity in that context; rather, a petitioner whose communications are defamatory may be answerable in libel if he is shown to have acted with malice, as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In reaching this conclusion, the Court observed:

> The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression . . . .
>
> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting

> greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

McDonald, 472 U.S. at 482, 485 (citations omitted).

As the arguments advanced in the briefs in the case at bar make clear, the Supreme Court cases we have just canvassed, while long on nuance, do not yield an easily identified single common denominator.

San Filippo and the Rutgers AAUP would have us regard San Filippo's petitions as activities protected under the first amendment unless those petitions were "mere shams" or "baseless litigation." They stress that none of the very narrow limitations the Supreme Court has placed on the right to petition involves an examination of the content of the petition. They also argue that the petitions at issue in *Noerr* and *Pennington* did not address matters of public concern, and therefore those cases implicitly rejected the proposition that petitioning is protected under the first amendment only if the petition addresses a matter of public concern. The Rutgers AAUP contends that "there is every reason that the lines drawn around the right to petition in public employment be the same as those drawn for selfish petitioners everywhere." That is, the Rutgers AAUP would have us define the contours of the right to petition without consideration of the context in which that right is exercised.

In contrast, Rutgers argues — we think persuasively — that "[t]he nature of the limitation upon the petition right depends upon context." Rutgers contends that the Supreme Court cases analyzing the extent of the petition right in the antitrust, labor law and libel contexts are not necessarily instructive in the case at bar, which concerns the ability of a government employer to dismiss an employee for filing lawsuits and grievances against the employer. This argument that the scope of the petition right depends upon the context in which the right is exercised is particularly persuasive because the scope of the free speech right — a right that, like the petition right, is stated in unqualified

terms in the first amendment — depends on the context in which that right is exercised.[17]

That the scope of the right to petition depends upon context does not, however, mandate the further conclusion that the "public concern" threshold of *Connick* should limit the right to petition in the context of a government employer's ability to discipline a public employee. The general question posed by the case at bar is whether — notwithstanding the dicta from *McDonald* quoted above — there are contexts in which the petition clause protects values additional to those protected by the speech clause.

McDonald is a case in which the petition clause protects no value that is not protected by the speech clause. The petition at issue in *McDonald* was a letter to the President. *Smith* and *Knight* instruct that not every communication which the writer denominates a "petition" imposes on the government agency or official addressed an obligation to

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17. San Filippo and the Rutgers AAUP rely upon cases from contexts other than public employment/retaliatory discharge in support of the argument that a lawsuit is protected — regardless of content — unless it is baseless. Most significantly, San Filippo contends that our decision in *Hoeber on behalf of the NLRB v. Local 30*, 939 F.2d 118 (3d Cir. 1991) forecloses Rutgers' position. As explained in note 16, *supra*, in *Hoeber* we held, following *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), that a court may not enjoin a pending lawsuit as an unfair labor practice unless the plaintiff had an improper motive for bringing the suit and the suit had no reasonable basis. *See Hoeber*, 939 F.2d at 126. San Filippo argues that, because the breach of contract lawsuit at issue in *Hoeber* appeared to address only matters of private concern, the case supports his argument that his lawsuits and grievances addressing only matters of private concern are protected under the petition clause. We disagree. Because this case does not arise in the public employment/retaliatory discharge context, it is not on point.

Many other cases cited by San Filippo and the AAUP are similarly inapposite because they arise in other contexts. *See, e.g., Milhouse v. Carlson*, 652 F.2d 371, 373 (3d Cir. 1981) (disciplinary proceedings allegedly brought against a prisoner in retaliation for having filed a civil rights lawsuit); *Goff v. Burton*, 7 F.3d 734, 736 (8th Cir. 1993) (same); *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990) (same); *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986) (same); *Duvall v. Sharp*, 905 F.2d 1188 (8th Cir. 1990) (arrest allegedly made in retaliation for filing a civil rights lawsuit).

respond. *See Knight*, 465 U.S. at 285; *Smith*, 441 U.S. at 465. Accordingly, it is difficult to distinguish in any meaningful way between words contained in a letter to the President and words contained in, for example, an advertisement appearing in the *New York Times*. This difficulty presumably was the underpinning of the *McDonald* Court's holding that McDonald's words about a public figure should not be immunized simply because they appeared in a letter characterized as a "petition." Moreover, the reasons for holding that the first amendment does not immunize maliciously defamatory falsehoods contained in a newspaper advertisement equally justify holding that the first amendment does not immunize maliciously defamatory falsehoods contained in a letter to the President. There is no value in a petition that seeks to influence the President by means of false statements. As in the context of speech, the additional requirement that malice be shown before liability may be imposed avoids overdeterrence.

The same difficulty in drawing a meaningful distinction between the speech found in the petition at issue in *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990) (per curiam) and other employee speech underlies the holding of that case. Schalk, a hospital employee, had hand-delivered to the hospital board members a four-page letter describing her concerns about various management practices at the hospital. Schalk was formally reprimanded for complaining about matters unrelated to her area of responsibility. The reprimand indicated that Schalk would be discharged if she made further complaints of this nature. After Schalk told a board member that she wanted to meet with the board to discuss concerns akin to those described in her letter, she was terminated. Schalk then filed a lawsuit alleging that she was fired for writing a letter to, and later speaking with, board members about management practices, in violation of her first amendment speech and petition rights.

The Tenth Circuit first held that Schalk's letter and her comments to the board member addressed a matter of public concern. *Id.* at 496. In a brief analysis of Schalk's petition clause claim, the court stated: "In the instant case, Schalk's right to petition is inseparable from her right to speak. As such, we see no reason to subject this claim to

a different sort of analysis." *Id.* at 498 (citing *McDonald*). As in *McDonald*, because the "petition" at issue was simply a letter imposing on the government no obligation to respond, it was properly analyzable under the conventional *Connick* rubric applicable to speech.

The case at bar is unlike *Schalk* in the sense that what San Filippo characterizes as "petitions" are not letters to the government-employer, but lawsuits and grievances directed at the government-employer or its officials. Submissions of this sort purport to invoke formal mechanisms for the redress of grievances.[18] Notwithstanding this distinction, each circuit court to consider the issue has held that a public employee who alleges that he or she was disciplined in retaliation for having filed a lawsuit against his or her employer does not state a claim under §1983 unless the lawsuit addressed a matter of public concern.[19] Recognizing that the question is a difficult one, we find ourselves unable to subscribe to the reasoning of our sister circuits.

Of these circuits, the Seventh Circuit has addressed the issue in the most detail. In *Altman v. Hurst*, 734 F.2d 1240

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18. Lawsuits, grievances, workers compensation claims, etc. share this feature of invoking a formal mechanism for redress of grievances against the government. We occasionally use the term "lawsuit" to encompass any device invoking a mechanism for redress of grievances against the government.

19. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Day v. South Park Independent Sch. Dist.*, 768 F.2d 696, 703 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *Rice v. Ohio Dep't of Transportation*, 887 F.2d 716, 720-21 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (per curiam); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985) (per curiam); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.) (per curiam), *cert. denied*, 469 U.S. 823 (1984). *Cf. Boyle v. Burke*, 925 F.2d 497, 505-06 (1st Cir. 1991) (dicta). *But see Fuchilla v. Prockop*, 682 F. Supp. 247, 262 (D.N.J. 1987), (reading *California Motor Transport* to support the holding that a public employee may not be retaliated against for filing a lawsuit regardless of whether the lawsuit addressed a matter of public concern).

(7th Cir. 1984) (per curiam), decided before *McDonald*, the Seventh Circuit held that a police officer who alleged that he was reassigned, denied overtime opportunities and otherwise harassed in retaliation for filing a lawsuit against his employer addressing matters of private concern did not state a claim under §1983. The court explained:

> Several Supreme Court cases indicate that the first amendment protects a person's right to seek judicial redress of grievances. *See NAACP v. Button*, 371 U.S. 415, 429. A close reading of these cases clearly shows that the Court was concerned about political expression and not the general right to bring suit in a federal court of law. *See, e.g., Button*, 371 U.S. at 429. ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this county. It is thus a form of political expression."). This formulation dovetails with the *Connick* rule that limits the first amendment protection given public employees to pronouncements on public issues. Thus, a private office dispute cannot be constitutionalized merely by filing a legal action.

Id. at 1244 n.10 (some citations omitted).[20] That is, the

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20. The Seventh Circuit reiterated this sentiment in *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412 (7th Cir. 1988):

> The contention that every act of retaliation against a person who files charges of wrongdoing with a public agency denies freedom of speech or the right to petition for redress of grievances rests on the following syllogism: litigation is a method recognized by the Supreme Court, as in *NAACP v. Button*, 371 U.S. 415, 429-31 (1963), for advancing ideas and seeking redress of grievances; retaliation against one who institutes litigation (or its condition precedent in Title VII litigation, the lodging of charges with civil rights agencies) discourages litigation; therefore such retaliation invades a First Amendment right. The weakness is the first premise, which is stated too broadly. Some litigation seeks to advance political or other ideas; litigation by the NAACP seeking to eliminate public school segregation is an example. And even when litigation has private

Seventh Circuit explicitly rejected the proposition that the petition clause protects access to the courts for any reason other than that the courts may serve as fora for expression. In *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988), the Seventh Circuit relied on *McDonald* as further support for its holding that a public employee may be terminated in retaliation for filing a grievance unless the grievance addressed a matter of public concern. The *Belk* court stated:

> Notwithstanding the central importance *Connick* attaches to the content of a public employee's speech, Belk asks us to accord absolute first amendment protection, without regard to content, to *any* grievance a public employee files or threatens to file. Not only is there no legal or historical precedent for such a stratification of first amendment freedoms, as *McDonald* suggests, but such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form.

Id. at 1262 (emphasis in original). Again, affording special treatment to speech found in a grievance is "unjust" only if no independent reason exists for affording special protection to a mechanism for redress of grievances against the government.

> rather than public objectives, communications designed to acquaint individuals with their legal rights are within the scope of the First Amendment. But not every legal gesture — not every legal pleading — is protected by the First Amendment. Remedies against baseless litigation do not violate the First Amendment's right to petition; nor do laws aimed at deterring 'far out' suits by requiring the loser to pay the winner's legal fees.

Id. at 419 (citations omitted). Because the court concluded that Yatvin's sex discrimination claim against her employer had purely private objectives, the court rejected Yatvin's claim that her employer's retaliation violated the petition clause. *Id.* at 419-20. This conclusion may, however, be regarded as dictum because the court also held that Yatvin's first amendment claim was foreclosed by her failure to raise the claim below with sufficient particularity. *See id.* at 420.

There is an additional argument for testing a public employee's lawsuits against his or her employer by the *Connick* public concern threshold not made in the Seventh Circuit cases: namely, that the governmental interests which led the Court to impose the public concern threshold on employee speech would appear to justify imposing a similar threshold on employee lawsuits and grievances. Under *Connick*, employers are able to discipline their employees for speech unless the speech addresses a matter of public concern. The rationale for this distinction is that it represents an effort to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142. The Supreme Court recently elaborated on the basis for authorizing the government as employer to exercise broader power in regulating the speech of its employees than the government as sovereign may exercise in regulating the speech of the general public:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to say or do things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the government may, in the example given above, fire the [high-ranking] deputy [who criticizes her state governor's legislative program] is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more efficiently.
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> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and

> efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a relatively significant one when it acts as employer. The government cannot restrict speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Waters v. Churchill, 62 U.S.L.W. 4397, 4401 (May 31, 1994).

We recognize that employee lawsuits and grievances against a public employer can, on occasion, be divisive in much the same way that employee speech can be. Nonetheless, we believe that there is an independent reason — a reason of constitutional dimension — to protect an employee lawsuit or grievance if it is of the sort that constitutes a "petition" within the meaning of the first amendment.

The first amendment's petition clause imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances. Through its incorporation of the first amendment, the fourteenth amendment's guarantee of "liberty" imposes the same obligation on the states. *Smith* and *Knight* stand only for that proposition that neither the United States nor the several states are required to recognize as a "petition" whatever particular communication is so characterized by one who chooses to protest governmental acts or omissions. But when government — federal or state — formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur. We do not share the Seventh Circuit's apprehension that not applying the *Connick* "public concern" standard to retaliatory dismissal of a public employee who files a "petition" would constitute "special treatment of the right to petition [that] would

unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form." *Balk*, 858 F.2d at 1262. As applied to communications that are not petitions, the *Connick* rule means that a public employee who goes public — e.g., by writing to *The New York Times* — with an employment dispute that is not of "public concern" runs the risk of being disciplined by her public employer for undertaking to draw public attention to a private dispute. But when one files a "petition" one is not appealing over government's head to the general citizenry: when one files a "petition" one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair.[21]

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21. Like the Seventh Circuit in *Belk*, our dissenting colleague draws comfort from the Supreme Court's observation in *McDonald* that the first amendment right to petition and the first amendment "freedoms to speak, publish and assemble . . . are inseparable" and hence "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." 472 U.S. at 485. But it is important to note that the Court's language in *McDonald* was addressed to a question very different from the question presented in *Belk* and the case at bar. In *McDonald* the question was whether one who was defamed in a letter was disabled from suing the letter-writer by virtue of the fact that the letter was written to the President and thus could be characterized as a "petition" within the meaning of the first amendment. In holding that the letter-writer was amenable to suit at the hands of the person defamed, under the same state law standards, compatible with *New York Times v. Sullivan*, 376 U.S. 254 (1964), that would have applied had the letter been written to a newspaper, the Court was not called upon the consider the question presented in the case at bar — namely, whether the *addressee* of a "petition" (in *McDonald*, the President) could sanction the letter-writer for pursuing a constitutionally charted pathway of communication with government.

It is also worthy of note that the letter-writer in *McDonald* apparently did not limit the audience for his defamatory efforts to President Reagan. The letter-writer allegedly also saw fit to send copies of one or both of the letters to Senator Jesse Helms, three members of the House of Representatives, and the then Director of the Federal Bureau of Investigation, William Webster, as well as then Presidential Adviser Edwin Meese. 472 U.S. at 481.

One example of formal governmental adoption of a mechanism for redress of grievances is entry into a collective bargaining agreement that provides for a grievance procedure. Another example of formal government adoption of such a mechanism is waiver of sovereign immunity from suit in the courts of that sovereign. If government could, *qua* employer, freely discharge an employee for the reason that the employee, in order to present a non-sham claim against the government-employer, invoked such a mechanism, the petition clause of the first amendment would, for public employees seeking to vindicate their employee interests, be a trap for the unwary — and a dead letter.

The petition clause of the first amendment was not intended to be a dead letter — or a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press. To be sure, "the right to petition," as the Court noted in *McDonald*, "is cut from the same cloth as the other guarantees of that Amendment. . . ." 472 U.S. at 482. But the Court in *McDonald* also stressed that the right to petition "is an assurance of a particular freedom of expression." *Ibid.* More to the point, the right to petition has a pedigree independent of — and substantially more ancient — than the freedoms of speech and press. The Court pointed out in *McDonald* that "[T]he historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: '[I]t is the Right of the Subjects to petition the King.' 1 Wm. & Mary, Sess. 2, ch. 2." *Ibid.*[22] But of particular moment for

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22. The remote antecedents of the right of petition trace back to Magna Carta, chapter 61 of which provides:

> . . . if we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one, or shall have transgressed any of the articles of peace or security; and the wrong shall have been shown to four barons of the aforesaid twenty-five barons, let those four barons come to us or to our justiciar, if we are out of the kingdom, laying before us the transgression, and let them ask that we cause that transgression to be corrected without delay.

But of course the right lukewarmly acknowledged by King John was exercisable only by his barons.

the issue before us is that Parliament, in the Bill of Rights, not only declared the right of subjects "to petition the King," but went on to provide that "all committments [*sic*] and prosecutions for such petitioning are illegal." 1 W. & M., 2d Sess., c. 2, § 5, 16 Dec. 1689. The right to petition and its attendant, and indispensable, immunity from "committments and prosecutions"[23] were, in the Court's felicitous phrase, "exacted of William and Mary," *McDonald*, 472 U.S. at 482, in 1689. That was precisely one hundred

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23. The critical importance of Parliament's declaration that it was "illegal" to penalize a subject "for such petitioning" was made plain by Blackstone in his celebrated *Commentaries*, the series of law books best known to American lawyers of the late eighteenth and early nineteenth centuries:

> If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told that the czar Peter established a law, that no subject might petition the throne till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince: but upon pain of death, if found to be in the wrong: the consequence of which was, that no one dared to offer such third petition: and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different: and, while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. C. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the country: and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. and M. st. 2, c. 2, that the subject hath a right to petition: and that all commitments and prosecutions for such petitioning are illegal.
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> 1 *William Blackstone, Commentaries* *143.

years before the first Congress charged with implementing America's new Constitution submitted to the states, for ratification, proposed amendments to that Constitution permanently establishing in American law the right of petition and other fundamental rights. There is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago.

On remand, the district court should consider which, if any, of San Filippo's grievances and lawsuits constituted a "petition," and whether any such "petition" was non-sham. The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.

B. *Substantial factor*

Our decision to vacate the grant of summary judgment on San Filippo's first amendment claim also requires us to consider Rutgers' argument that, contrary to the district court's conclusion, it was entitled to summary judgment because San Filippo cannot show that his protected conduct "was a substantial factor in the alleged retaliatory action." *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983).

The district court explained that courts have drawn an inference of retaliation based on the nearness in time between the protected activity and a discharge. Although the district court believed that no fact-finder could reasonably infer that San Filippo's protected activities in 1977-1979 and 1983-84 were a substantial factor motivating his dismissal, the court concluded that San Filippo was brought up on charges and dismissed sufficiently soon after he made protected statements in or around 1986[24] to raise an inference of retaliation.[25]

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24. The court presumably was referring to San Filippo's disputes with senior members of his department over their efforts to obtain "inappropriate percentages" of his federal grants, and particularly his complaint to the University in October, 1985 about the chemistry department's attempts to divert funds improperly from his federal grants under the guise of a "shop-user's fee." *See* page 5, *supra*. San Filippo was orally informed of the charges against him in November, 1985.

25. The activities found by the district court to address matters of public concern are described briefly at note 13, *supra*.

At the outset, we disagree with the district court's view that San Filippo's protected activities in 1977-79 and 1983-84 were too far removed in time to support any inference of retaliation. Although a dismissal that occurs years after protected activity might not ordinarily support an inference of retaliation, where, as here, a plaintiff engages in subsequent protected activity and the plaintiff is dismissed shortly after the final episode of such protected activity, a fact-finder may reasonably infer that it was the aggregate of the protected activities that led to retaliatory dismissal. This inference would be particularly strong if the plaintiff can show that the decisionmaker lacked a pretext on which to dismiss the plaintiff until shortly before the time of dismissal.

Rutgers argues that the temporal proximity between San Filippo's protected activities and the disciplinary proceedings against him cannot, by itself, support an inference that the protected activity was a substantial factor in the alleged retaliatory action. We need not address this argument, however, because San Filippo has additional evidence to support his allegation that he was dismissed in retaliation for his protected activity. The evidence described above as support for San Filippo's position that he would not have been dismissed absent his protected activities — the statements of Dean Edelstein and Board of Governors member Wechsler and the evidence that other faculty members committed infractions of comparable seriousness yet went unpunished — equally support his position that his protected conduct was a substantial factor motivating his dismissal. On the basis of this evidence, we conclude that a fact-finder could reasonably find that San Filippo's protected conduct was a substantial factor motivating his dismissal.

Rutgers next argues that San Filippo is inappropriately seeking to impute to the members of the Board of Governors the improper motives of those responsible for bringing charges against him. Rutgers contends that, under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), the University can only be held liable if the Board members personally determined to dismiss San Filippo on the basis

of his first amendment activities or knowingly acquiesced in the decision to do so by approving both the decision and the allegedly improper basis for it. But this, according to San Filippo, is too narrow a standard of liability: in San Filippo's view, the University should be held liable if the fact-finder concludes that (a) the charges against San Filippo were initiated in retaliation for the exercise of his first amendment rights and (b) the Board members were "deliberately indifferent" to that fact.

In *Monell*, the Supreme Court held that, although municipalities and other local governing bodies can be sued under 42 U.S.C. §1983, liability cannot be imposed on such an entity on a theory of vicarious liability for the torts of the entity's employees. Rather, a local governing body can be held liable only for an official policy or custom. *See Monell*, 436 U.S. at 694. A single decision by a final policy-maker, as defined by state law, may constitute official policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). Rutgers argues that the Board of Governors is the only final policy-maker in this case, and that the Board did not have a retaliatory motive when it voted to dismiss San Filippo.

San Filippo contends that he need only show that the Board members were "deliberately indifferent" to the fact that he had been brought up on charges in retaliation for the exercise of his first amendment rights. He relies on *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), in which the Supreme Court held that Canton's failure to train police officers to give medical attention could be a basis for imposing §1983 liability if "the failure to train amount[ed] to deliberate indifference to the rights of persons with whom the police [came] into contact." *Id.* at 388. The *Canton* Court explained that the use of the deliberate indifference standard was most consistent with the Court's "admonition in *Monell* that a municipality can be liable under §1983 only where its policies are the 'moving force [behind] the constitutional violation.'" *Id.* at 388-89 (citations omitted).

The Tenth Circuit extended *Canton* to a situation analogous to the case at bar in *Ware v. Unified School Dist. No. 492*, 902 F.2d 815 (10th Cir. 1990). The plaintiff in *Ware* served as clerk to a school board and secretary to the

superintendent of the school district. She alleged that her superintendent had recommended to the board that she be dismissed in retaliation for her protected speech, and that the board had acted with deliberate indifference to her first amendment rights in approving the termination. The *Ware* court rejected the board's argument that *Canton* be limited to its facts, and held:

> There is evidence in the record to support Ware's claim that the Board acted with deliberate indifference to her First Amendment rights in approving her termination. . . . The record contains evidence that board members knew about Ware's public stand on the bond issue and were informed of her belief that her termination was in retaliation for that stand. . . . Notwithstanding the above indications that the board knew [the superintendent's] recommendation was in retaliation for Ware's position on the bond issue, the board made no independent investigation, asked [the superintendent] no questions about the reasons for his decision. . . . The evidence is sufficient to create a jury question on whether the board acted with deliberate indifference to Ware's First Amendment rights in approving [the superintendent's] recommendation.

Id. at 819-20.

We agree with the Tenth Circuit that its application of the deliberate indifference standard of *Canton* is most consistent with the "'admonition in *Monell* that a municipality can be liable under §1983 only where its policies are the moving force [behind] the constitutional violation.'" *Ware*, 902 F.2d at 819 (quoting *Canton*, 489 U.S. at 388-89) (citations omitted). Nor is this use of the deliberate indifference standard inconsistent with *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion). *Praprotnik* recognized that final decision-making power may be delegated, and that a local governing body may be held liable based upon the exercise of this delegated power. *See id.* at 124. But the Court added:

> Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally

> consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them. It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. . . . But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale.

Id. at 130. In addition to holding that the "mere failure to investigate the basis of a subordinate's discretionary decisions" does not make the subordinate a final policy-maker, the *Praprotnik* Court also implicitly held that the local governing body is not liable for the mere failure to investigate by the final policy-maker.

Our use of a "deliberate indifference" standard does not make the University liable for the Board's *mere* failure to investigate — that is, the University would not be liable if, oblivious to the motivation behind the decision to charge San Filippo and to initiate dismissal proceedings, the Board had decided to dismiss San Filippo for wholly legitimate reasons. Such a scenario would not amount to deliberate indifference of the Board to San Filippo's first amendment rights. The scenario described by San Filippo, however, goes beyond that of an oblivious Board failing to investigate.

San Filippo presented to the district court evidence that the Board had reason to suspect that San Filippo's prior protected activities had been a substantial motivating factor in the decision to initiate dismissal proceedings. As the magistrate judge noted, "the record is replete with evidence which indicates that the information regarding San Filippo's protected activities was well known to the individual members of the Board." (A.2152 n.15). Moreover, Wechsler's dissenting opinion discloses awareness at the level of the

Board of San Filippo's contention before the Senate Panel that other faculty members had had students perform uncompensated work for them, yet were not disciplined. (A.325). Finally, the Board's opinion recognizes that San Filippo's attorney, Ira Goldberg, had argued that "the charges brought against Professor San Filippo were fabrications based on a personal 'vendetta' against him by members of his Department." (A.304). As in *Ware*, this evidence suffices to create a question for the fact-finder regarding whether the ultimate decision-maker acted with deliberate indifference to the plaintiff's first amendment rights by approving the recommendation that the plaintiff be dismissed.[26]

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26. The Supreme Court's recent decision in *Waters v. Churchill*, 62 U.S.L.W. 4397 (May 31, 1994) provides additional support for our use of the *Canton* "deliberate indifference" standard in the case at bar. In *Waters*, the Court addressed the question whether the *Connick* test should be applied to what the government employer thought the employee said, or to what the fact-finder ultimately determines was said. The Court took an intermediate position, holding that a court should accept the employer's factual conclusions, but only if the employer was reasonable in arriving at those conclusions. *Id.* at 4401-02. In elaborating on what would constitute reasonable conduct by an employer, the Court explained:

> If an employment action is based upon what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision — discharge, suspension, reprimand, or whatever else — of the sort involved in the particular case. Justice Scalia correctly points out that such care is not normally constitutionally required unless the employee has a protected property interest in her job, but we believe that the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary.

Id. at 4402. By holding that the University may be held liable if a fact-finder finds that the Board of Governors was deliberately indifferent to the possibility that dismissal proceedings were initiated against San Filippo in retaliation for the exercise of his first amendment rights, we similarly require his employer to "tread with a certain amount of care" to avoid "the possibility of inadvertently punishing someone for exercising [his] First Amendment rights."

III. San Filippo's procedural due process claim

San Filippo also asks us to vacate the district court's grant of summary judgment on his procedural due process claim. San Filippo argues that his due process rights were violated because the five members of the Senate Panel that conducted the hearings and recommended that he be dismissed were not impartial decision-makers and because the proceeding was tainted by the appearance of impropriety. Specifically, San Filippo alleges in his Third Amended Complaint:

> [The] members of the panel were negotiating with the Rutgers Administrator chiefly responsible for supervising the prosecution of the case for additional compensation, thus giving them a financial incentive in the outcome of the proceedings, in that they reasonably would believe that they would get additional compensation only if their final decision was favorable to the Administrator. Furthermore, all the contacts for such additional compensation were held in secret, thus leading to the appearance of impropriety on the part of the Panel.

Both the magistrate judge and the district court rejected San Filippo's argument that a fact-finder could reasonably infer that the panel members believed they were more likely to be compensated if they recommended that San Filippo be dismissed. In addition, the magistrate judge and district court rejected San Filippo's argument that the "secret" negotiations about compensation created an appearance of impropriety. We agree with the conclusions reached by the magistrate judge and district court.

The Senate Panel was composed of five faculty members, chosen by lot after for-cause and peremptory challenges, whose responsibility was to hold hearings and determine whether the charges brought against San Filippo were true and constituted grounds for his dismissal. The panel had twelve meetings after it convened on December 5, 1986 and before the evidentiary hearings began. Between March 24, 1987 and September 22, 1987, the panel devoted forty-six days to evidentiary hearings. After closing arguments, the panel held another twelve meetings before it produced a

forty-four page report on December 21, 1987. Throughout the hearings, San Filippo was represented by two attorneys, Ira and Pamela Goldberg, and a union counsellor provided by the Rutgers AAUP, Dr. Wells Keddie.

With the knowledge and consent of San Filippo's attorneys, Dr. Keddie, on March 5, 1987, sent a memorandum to the panel chair, Dr. Szatrowski, copied to San Filippo and his attorneys. The memorandum suggested various ways to deal with time and scheduling problems:

> I don't have a single original or good idea as to how to resolve the time bind, but there are some things which might mitigate the impact upon the committee members. One of them is the course you are already pursuing, the seeking of some relief from normal duties while this demanding activity proceeds. It seems to me that if the proceedings cannot be concluded by the May 15 date, it would be entirely appropriate to request the equivalent of Summer Session pay for all of you or released time for those of you (yourself) on "summer vacation" in the upcoming trimester. But another possibility might well be worth considering: released time *after* this is all over to enable committee members to make up for considerable lost time, energy, and opportunity.

Dr. Keddie also suggested that panel members "be provided meals and accommodations."

When it became clear that the hearings would not conclude before commencement, Szatrowski asked San Filippo's attorney, Ira Goldberg, if he had any objection to Szatrowski asking Dr. Susan Cole, Vice President for University Administration and Personnel, for summer compensation for the panel members. Szatrowski and Goldberg both testified in their affidavits that Goldberg voiced no objection and wished Szatrowski "good luck."

When Szatrowski first requested additional compensation and/or released time in the spring of 1987, Cole denied the request because she believed that the panel members were already under an obligation to participate without extra compensation. In late spring, Szatrowski renewed the request in light of the length of the hearings and the fact

that certain panel members were ordinarily not required to be in attendance at Rutgers over the summer. By letters dated July 29, 1987, Cole granted the members their requested extra compensation and release time. San Filippo was not told of this decision.

Shortly after the summer increases were granted, Szatrowski asked Cole for further additional compensation when it became clear that the hearings would continue into the fall. Cole testified that when Szatrowski approached her about the matter of further payments, she "told him when the panel was finished with its business, that we could discuss the matter again." Szatrowski similarly testified:

> When I asked if this [the refusal to grant more compensation] meant that regardless of the amount of additional time spent on this matter by the panelists while carrying out their normal duties, there would be no further consideration for additional compensation in the future, Dr. Cole indicated that there would be no consideration possible until after the completion of the hearings.

Ultimately, after the panel issued its final report recommending that San Filippo be dismissed, Cole recommended that the panel members receive extra compensation.

Based upon this factual scenario, San Filippo alleges that the panel members would have been tempted to reach an outcome in Rutgers' favor because they would have believed that they were more likely to get extra compensation if they did so. We agree with the magistrate judge and district court that there is insufficient evidence to support an inference that the faculty members believed that their receipt of compensation was tied to the outcome of the proceedings. The cases cited by San Filippo are cases in which the adjudicator had a direct financial interest in the outcome. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (mayor acting as judge shared in the fees and costs levied by him); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (mayor responsible for village finances could not act as judge when fines and forfeitures provided substantial portion of village funds). The Supreme Court has held that

the impermissible pecuniary interest must be realistic and more than "remote." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980). We find no evidence in the record to support a conclusion that the panel members believed that they were more likely to be compensated if they recommended San Filippo's dismissal.

San Filippo alternatively argues that the panel members' participation in the hearings while negotiating for additional compensation created an appearance of impropriety. *See Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (arbitration panel "not only must be unbiased but must also avoid the appearance of bias"). Under *Commonwealth Coatings*, to prevail on an "appearance of impropriety" due process claim, San Filippo must establish both that the events in question would cause one to reasonably question the panel's impartiality and that the information was concealed from San Filippo. San Filippo makes much of the fact that he was not told about the meetings between Szatrowski and Cole; however, in light of the fact that Keddie suggested that Szatrowski broach the subject of extra compensation, these meetings do not have the invidious character San Filippo suggests.

Finally, San Filippo argues that he should have had the opportunity to depose Szatrowski to determine what was said in the conversations between Szatrowski and Cole. San Filippo contends that, although he noticed Szatrowski's deposition in August 1989, all discovery was stayed after November 1989 when the motions for summary judgment were filed. As the district court noted, San Filippo has failed to explain why Szatrowski was not deposed before August 1989 — particularly, why he was not deposed during the summer and fall of 1989 when San Filippo deposed nine other current and former officials and employees of Rutgers. Moreover, San Filippo does not indicate how he expects the deposition testimony of Szatrowski to differ from the testimony found in Szatrowski's affidavit, dated April 2, 1990. For these reasons, we conclude that the district court did not abuse its discretion by refusing to delay decision on the summary judgment motions until San Filippo had a chance to depose Szatrowski.

IV. Conclusion

For the foregoing reasons, we affirm in part and vacate in part the order of the district court. We affirm the district court's grant of summary judgment in Rutgers' favor on San Filippo's due process claim. We vacate the district court's grant of summary judgment in Rutgers' favor on San Filippo's first amendment claim, and remand for proceedings consistent with this opinion.

BECKER, *Circuit Judge*, concurring and dissenting.

While I agree with almost all of the majority opinion, I cannot join in the conclusion to Part IIA, pages 33 to 37, holding that a public employee is protected under the Petition Clause against retaliation for having filed a petition (in the nature of a lawsuit or grievance) addressing a matter of purely private concern. I would adopt the position of the seven other circuits which hold that a public employee plaintiff who has "petitioned" is in no better position than one who has merely exercised free speech. *See* Majority Typescript at 29-30 n.19 (listing circuits).

I need not offer extended justification for my position, for the majority has already done so when describing these other circuits' views at pages 19 to 33 of its opinion. Although the majority then arrives at a conclusion in contradistinction to its preceding analysis, the majority's rationale supporting its conclusion pales by comparison with the reasoning of the other circuits and with the inexorable logic of *McDonald v. Smith*, 472 U.S. 479 (1985). In a nutshell, I simply do not believe that the fact that the government adopts a formal redress mechanism gives one who pursues it more protection than if the person had written a letter to the editor or made a speech. As the Supreme Court explained in *McDonald*:

> The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

472 U.S. at 484-85. The same holds true when the petition is addressed to the courts or to university officials.

In my view, the Supreme Court would be surprised to learn that, although, as a result of "the nature of the government's mission as employer," a public employer (such as Rutgers) can fire someone who "begins to say or do things that detract from the agency's effective operation" so long as the speech is on a matter of private concern, *Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (May 31, 1994)

(quoted in Majority Typescript at 33), the government cannot fire the same individual if he or she speaks after invoking a formal mechanism for the redress of grievances (or speaks through that forum). Such an interpretation of the Petition Clause, rather than making that clause a "trap for the unwary" as the majority contends would be the consequence of my interpretation of the Clause, Majority Typescript at 35, is an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined. This would undermine the government's special role as an employer.

The majority argues that in contrast to speech on a matter of private concern, "when one files a 'petition' one is not appealing over government's head to the general citizenry: when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." Majority Typescript at 34. But the libelous letter to the President at issue in *McDonald*, 472 U.S. at 484-85, took the form of an address to government rather than the general citizenry, and yet the Court held that the letter received no greater constitutional protection as a result. And the fact that San Filippo's speech addressed government did not make it any less disruptive of the workplace environment than if it had addressed the general public; indeed, the speech may have been more disruptive because it still reached the public (lawsuits, for example, are matters of public record) and, in addition, compelled the university to respond to the lawsuits and grievances.

The majority argues that it would undermine the Constitution's purposes to allow government to punish someone for invoking a mechanism to which government has given "its constitutional imprimatur." Majority Typescript at 34. However, the *constitutional* imprimatur of the Petition Clause applies equally to the letter to the President at issue in *McDonald* as to the lawsuits and grievances at issue here. By waiving sovereign immunity to suit or adopting grievance procedures, the government may give special statutory/regulatory imprimatur to these mechanisms as opposed to other forms of petitions such as letters, but it does not give them a special *constitutional*

imprimatur. Moreover, the government *has* given its regulatory imprimatur to the letter at issue in *McDonald* by setting up an office in the White House that is designed to respond to correspondence. Finally, for lawsuits at least, the state's waiver of sovereign immunity is not specific to suits by public employees and thus may not be at all meant as a recognition of an employee's right to file repeated lawsuits against his or her employer.

Nor, by adopting such petition mechanisms, does the government somehow increase the employee's interest in having free license to protest his or her employer's decisions. For example, San Filippo would have had the same interest in protesting the failure of the chemistry department to recommend him for a full professorship if the university had not adopted a grievance procedure. *Connick* declares that this interest is outweighed by the university's interest in regulating its work environment.

Finally, the majority's suggestion that a contrary interpretation would render the Petition Clause a "dead letter" is hyperbolic. *Inter alia*, the clause would still have use when there is a "petition," in lieu of more conventional speech. Moreover, even if all petitions now constitute speech (given the broad interpretation the Supreme Court has given to speech), I do not see why it matters that the guarantees overlap. There were certainly petitions that did not constitute speech when the First Amendment was ratified, meaning that the two clauses were not redundant when initially adopted. In addition, the First Amendment's guarantees of free speech and a free press also substantially overlap. *See* Laurence H. Tribe, *American Constitutional Law*, § 12-22, at 971 & nn. 2-3 (2d ed. 1988). *Cf. Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special information not available to the public generally.") At least the Petition Clause serves the function of emphasizing that freedom to petition *the government* directly is an important part of freedom of speech and prevents courts from deleting the petition right. As the Supreme Court stated in *McDonald*, the right to petition "is an assurance of a particular freedom of expression." 472 U.S. at 484-85.

Thus, the majority's "dead letter" argument cannot carry the day.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Filed Sept. 28, 1993
Civil Action No. 88-2575 (MTB)

JOSEPH SAN FILIPPO, JR.,

Plaintiff,

v.

MICHAEL BONGIOVANNI, *et al.*,

Defendants.

ORDER

This matter having come before the court through the May 25, 1993 Report and Recommendation of the Honorable Stanley R. Chesler, U.S. Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), Fed.R.Civ.P. 72(b), and Rule 40(D)(5) of the General Rules of this court; and the court having considered recommendations of the Magistrate Judge and the objections of the parties;

IT IS on this 28th day of September, 1993,

For the reasons expressed in the court's Opinion of even date hereby

ORDERED that plaintiff's motion for partial summary judgment is denied and defendants' motion for summary judgment on the Third Amended Complaint is granted.

/s/ MARYANNE TRUMP BARRY
Maryanne Trump Barry
U.S.D.J.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Filed Sept. 28, 1993
Civil Action No. 88-2575 (MTB)

JOSEPH SAN FILIPPO, JR.,

Plaintiff,

v.

MICHAEL BONGIOVANNI, *et al.*,

Defendants.

BEFORE:
HON. MARYANNE TRUMP BARRY, *U.S.D.J.*

OPINION

I. INTRODUCTION

This matter comes before the court upon the objections of the parties to the May 25, 1993 Report and Recommendation of the Honorable Stanley R. Chesler, U.S. Magistrate Judge, pursuant to Fed.R.Civ.P. 72(b) and District of New Jersey Local Rule 40D(5). The court will decide this matter based on

the submissions of the parties, without oral argument, pursuant to Fed.R.Civ.P. 78. For the reasons which follow, this court accepts in part, and rejects in part, the Magistrate Judge's Report and Recommendation. More specifically, this court denies plaintiff's motion for partial summary judgment and grants defendants' motion for summary judgment on the Third Amended Complaint.

II. BACKGROUND

On June 13, 1988, pursuant to 42 U.S.C. § 1983, plaintiff commenced this action against those persons who voted in favor of his dismissal from his tenured faculty position as a professor at Rutgers, The State University of New Jersey. Plaintiff alleged various violations of his rights under the Constitution of the United States, violations of his corresponding rights under the New Jersey State Constitution, and a pendent breach of contract claim.

Following the parties' cross-motions for summary judgment on a host of issues, this court granted plaintiff's motion for partial summary judgment on his void for vagueness claim, holding that, while plaintiff was stripped of his academic tenure and dismissed from his position as a professor at Rutgers because of ethical violations of "a high order", ethical standards were not included within the relevant regulations as dismissable offenses. *San Filippo v. Bongiovanni*, 743 F. Supp. 327 (D.N.J. 1990) ["San Filippo I"]. Given the court's disposition, it was unnecessary to decide the remainder of the motions. The void for vagueness issue was certified for interlocutory appeal to the Court of Appeals for the Third Circuit, and the action before this court was stayed pending appeal. The Third Circuit reversed the grant of partial summary judgment and the denial of defendants' motion on the same claim and remanded the case for further proceedings. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1139-40 (3d Cir. 1992) ["San Filippo II"]. After the Supreme Court of the United States denied plaintiff's petition for *certiorari*, *see San Filippo v.*

Bongiovanni, ___ U.S. ___, 113 S.Ct. 305 (1992), this court referred the remaining motions to the Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), Fed.R.Civ.P. 72(b) and Rule 40(A)(2) of the General Rules of this court.

In his Report and Recommendation, the Magistrate Judge addressed plaintiff's motion for partial summary judgment on his procedural due process claim and defendants' motion for summary judgment on plaintiff's Third Amended Complaint. Specifically, the issues before the Magistrate Judge were: (1) violation of plaintiff's First Amendment rights and comparable provisions of the New Jersey Constitution in that dismissal proceedings were commenced against him and he was dismissed in retaliation for his filing of lawsuits, grievances and complaints against the University and its employees, activity protected under the First Amendment (Third Amended Complaint at ¶ 28); (2) violation of his equal protection rights and comparable provisions of the New Jersey Constitution in that he was selectively chosen as a target for disciplinary action (*Id.* at ¶ 29); (3) violation of his procedural due process rights resulting from the conduct of the University Senate Panel hearing and the negotiation for additional compensation between one or more members of the Senate Panel and the administration while the hearing was ongoing (*Id.* at ¶ 30); and (4) breach of contract under the University's rules and regulations (*Id.* at ¶ 31). *See* San Filippo I, 743 F.Supp. at 332.

The Magistrate Judge recommended that summary judgment be granted in favor of defendants on (1) the breach of contract claim; (2) the procedural due process claim; and (3) the state constitutional claims to the extent that plaintiff seeks monetary damages, and determined that the cross-motions for summary judgment should otherwise be denied. Report & Recommendation at 9. Plaintiff and defendants timely filed and served objections to the Report and Recommendation.[1]

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[1] With the permission of this court, the parties were given an extension of time until July 2, 1993 within which to file their objections to the Magistrate Judge's Report and Recommendation.

III. DISCUSSION

Preliminarily, one observation must be made. This is a case which, at bottom, involves whether a tenured professor was appropriately dismissed for conduct which this court in its earlier opinion described as "alien to any concept of how civilized professionals should comport themselves", 743 F. Supp. at 338, a description plaintiff does not even pretend to dispute. Unfortunately, however, this rather straightforward issue has been all but lost in the controversy over what can only be described as a deluge of discovery demands (which, with little exaggeration, can be measured in feet, not inches) and the invocation by plaintiff of a potpourri of alleged constitutional violations, imagined but certainly not real, including the void for vagueness argument which, in this court's view, had some merit but which the Third Circuit has deep-sixed. What is crystal clear after a review of the extraordinary amount of paper submitted in this case is that none of plaintiff's claims passes muster and that he has not stated or shown that he was arbitrarily and capriciously deprived of his tenure rights or that he has otherwise brought a valid § 1983 claim. *See San Filippo II*, 961 F.2d at 1139. What is crystal clear, as well, is that Rutgers, which afforded plaintiff a hearing which lasted 46 days and culminated in a 44 page report recommending his dismissal and a 60 page opinion by the Board of Governors sustaining that recommendation, should now, finally, be rid of plaintiff.

That having been said, the court must address the parties' objections to the Report and Recommendation of the Magistrate Judge. In reviewing the recommendations of a Magistrate Judge, this court must apply the standards set forth in 28 U.S.C. § 636(b)(1)(C), Fed.R.Civ.P. 72(b), and Rule 40(D)(5) of the General Rules of the United States District Court for the District of New Jersey. Under the General Rules of this court, "[a]ny party may object to the Magistrate's proposed findings, recommendations or report issued . . . within ten

days of being served with a copy thereof". Rule 40(D)(5). The Rule provides further that the judge "shall make a *de novo* determination of those portions to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate". *Id.*

None of the parties objects to the Magistrate Judge's recommendation regarding summary judgment in defendants' favor on the breach of contract claim or the state constitutional claims to the extent that money damages are sought.[2] Accordingly, this court accepts the recommendations with regard to those claims, and summary judgment will be granted as to them.

Plaintiff, however, objects to the Magistrate Judge's conclusion that defendants are entitled to summary judgment on plaintiff's due process claim and that plaintiff is not. Alternatively, plaintiff contends that, at the very least, he should be granted more time for further discovery to develop facts to support this claim. Defendants object to the Magistrate Judge's recommendation that their motion for summary judgment insofar as it address plaintiff's First Amendment and equal protection claims be denied.

These objections will be addressed in turn.

A. Due Process Claim

Plaintiff asserts that the Magistrate Judge "gave insufficient weight" (Plaintiff's Brief in support of Objections to the Report and Recommendation, hereinafter "Pl.Br.", at 3) to the evidence demonstrating that "secret" ongoing "negotiations" and "*ex parte*" communications between members of the Senate Panel and the administration during the disciplinary proceedings and prior to the panel's issuance of its report, violated his procedural due process rights. In a nutshell,

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[2] Given that no federal claim is viable, any relief sought, aside from money damages, on plaintiff's state constitutional claims will not be entertained. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-28 (1966).

plaintiff argues that his due process rights were violated because the panel members were not impartial decisionmakers and the entire proceeding was tainted by the appearance of impropriety.[3]

1. Panel's Pecuniary Interest:

The Senate Panel was composed of five faculty members, chosen by lot, and charged with holding a hearing and determining whether the charges brought against plaintiff were true and constituted grounds for his dismissal under University regulations. *See* Report and Recommendation at 3-4 n.3.[4] In the spring of 1987, when it appeared that the hearing would continue into the summer, the panel Chair, Professor Ted R. Szatrowski, asked the Vice President for University Administration and Personnel, Dr. Susan A. Cole, to consider extra compensation and/or release time from instructional duties for the panel members. *See* Second Cole Aff. at ¶ 6. Dr. Cole initially denied the request because she believed that the panel members were already under an obligation to participate without extra compensation. Second Cole Aff. at ¶ 7. However, in late spring, 1987, the request for extra compensation was renewed and Dr. Cole reconsidered her initial position in light

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[3] These alleged violations are set forth more particularly in plaintiff's Third Amended Complaint, wherein plaintiff alleges, in pertinent part:

> [the] members of the [Senate] panel were negotiating with the Rutgers Administrator chiefly responsible for supervising the prosecution of the case for additional compensation, thus giving them a financial interest in the outcome of the proceedings, in that they reasonably believed that they would get additional compensation only if their final decision was favorable to the Administrator. Furthermore, all the contacts for such additional compensation were held in secret, thus leading to the appearance of impropriety on the part of the Panel.

Third Amended Complaint at ¶ 20.

[4] The description of the specifics of the various charges and their disposition before the panel are set forth more fully in San Filippo I, San Filippo II, and the Magistrate Judge's Report and Recommendation.

of the length of the hearing and the fact that certain panel members were not ordinarily required to be in attendance at the University over the summer. By letters dated July 29, 1987, she granted the members their requested extra compensation and release time. Second Cole Aff. at ¶¶ 11-12.

Shortly thereafter, and as the hearing ground forward, Professor Szatrowski asked for additional compensation for the panel members. Second Cole Aff. at ¶ 13. The Magistrate Judge noted a discrepancy in the record with regard to what next occurred. Dr. Cole either responded to this second request by stating, "When the Panel was finished with its business [they] could discuss the matter [of additional compensation] again", because "[she] didn't think it was appropriate" to discuss the matter while the hearing was still pending" (Cole Deposition of July 24, 1989 at 92-93), or she definitively responded that no further compensation would be granted. Second Cole Aff. at ¶ 13. Ultimately, after the panel concluded its proceedings and issued its final report recommending that plaintiff be dismissed, Dr. Cole recommended that panel members receive extra compensation. Second Cole Aff. at ¶ 14.

From this factual scenario, and regardless of which statement by Dr. Cole is to be believed, plaintiff alleges that the panel members had a pecuniary interest in the outcome of the hearings and, thus, that their participation in the hearings violated his due process rights. The Magistrate Judge framed the issue as follows:

> the central issue before the Court is whether there was a "possible temptation" to the "average" Senate Panel member to not hold the balance "nice, clear and true." If so, the Court must determine whether that temptation was "direct, personal, substantial, and pecuniary" or whether it was too remote to constitute a violation of due process.

Report and Recommendation at 39 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) and *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Plaintiff's statement of the issue does not differ in any meaningful way. *See* Pl.Br. at 18 ("the test is whether to an outside observer, there is a *reasonable possibility* that under the circumstances the decisionmaker might be tempted to decide in favor of one party in the proceeding because of the possibility of financial gain to herself or himself.") (emphasis in original).

Rather, plaintiff, invoking words such as "secret" and *"ex parte"* along the way and giving them sinister connotations, objects to the Magistrate Judge's conclusion that based on the fact that panel members received additional compensation pursuant to their initial request while the hearings were still ongoing and "without regard to the outcome of the hearings . . . could only suggest to [the panel members] that their renewed plea for relief would likewise be considered without regard to the results of the hearings". Report and Recommendation at 40-41. Plaintiff argues that because panel members obtained additional compensation from Dr. Susan Cole after one request, it was reasonable for them to believe and, in fact, "could only have led them to believe" that, on their second request for compensation, "they stood a better chance of loosening the University's purse strings if they came to a decision that pleased those with the power to pay [i.e., Dr. Cole]". Pl.Br. at 20-21.

Stated somewhat differently, plaintiff suggests that because of the purported interest of Dr. Cole in this matter, and because Dr. Cole controlled whether or not panel members received extra compensation, panel members reasonably believed that they would not get additional compensation in the future unless they rendered a decision favorable to the University, i.e., in favor of plaintiff's dismissal. Thus, plaintiff alleges that his procedural due process rights were violated because the panel members who decided his case reasonably believed that they had a financial stake in the outcome.

To support his argument, plaintiff relies on cases in which the adjudicating official had a direct financial interest which would be affected by his decisions. *See, e.g, Tumey v. Ohio*, 273 U.S. 510, 531 (1927) (mayor acting as judge shared in the fees and costs levied by him); *Ward*, 409 U.S. at 60 (mayor responsible for village finances could not act as judge when fines and forfeitures provided substantial portion of village funds); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (court found that when a Board member has a substantial pecuniary interest in the outcome of the proceedings, a plaintiff is deprived of his right to an impartial tribunal).[5] However, the impermissible pecuniary interest must be realistic and more than "remote". *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980). Indeed, the due process analysis of *Tumey*, *Ward*, and their progeny suggests that the crucial consideration is the remoteness of the pecuniary interest alleged to be the biasing influence. *See, e.g., Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (mayor's relationship to finances and financial policy of the village was too remote to warrant a presumption of bias in the mayor's role as judge); *Aiello v. Wilmington*, 426 F.Supp. 1272, 1292 (D.Del. 1976) (allegations that Bureau of Fire's Trial Board had a pecuniary interest in penalizing firemen for infractions was too attenuated as a matter of law because although Trial Board would assess "penalty hours" against errant firemen, which they were required to work off without pay, court rejected claim that Board had direct interest in that only by receiving such "free labor" could it stay within its budget).

Here, the burden is—and was—on plaintiff to come forward with specific facts sufficient to withstand summary judgment, a burden particularly difficult given the "presumption of honesty and integrity in those serving as adjudicators". Report

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[5] In *Gibson*, the Alabama Board of Optometry intended to revoke the licenses which were required of all optometrists employed by corporations. Members of the Board were drawn from a group limited to independent practitioners. The Supreme Court found that this amounted to a deprivation of due process, holding that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes". 411 U.S. at 579.

and Recommendation at 39-40 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Plaintiff, however, has presented no evidence that any panel member reasonably believed that his or her receipt of additional compensation was tied to the outcome of the proceedings. As the Magistrate Judge noted:

> . . . there is nothing in the record to suggest that they had any reason to believe that it would not be decided based on any reason other than its merits. Indeed, there is nothing in the record which indicates that Dr. Cole intimated in any way that additional compensation would hinge on the Panel's decision. Moreover, there is not even a hint that the proverbial "wink and a nod" was used to improperly influence the Panel.

Report and Recommendation at 41.

There is nothing in Dr. Cole's Second Affidavit, in which she definitively rejected the panel members' request for additional compensation, which raises even an inference that panel members could reasonably have thought it possible that she would change her mind *if* they rendered a decision favoring plaintiff's dismissal. Similarly, her deposition testimony leaves utterly no doubt that she deferred any conversation regarding additional compensation until the conclusion of the proceedings and nothing which even suggests that whether or when she revisited the issue would depend in any way on the outcome of the proceedings rather than on their termination. Ironically, it appears, at least to the court, that Dr. Cole was attempting to *avoid* any impropriety or any appearance thereof by declining to engage in negotiations or discussions until everything was over.[6] Indeed, plaintiff has presented no

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[6] Carried to its logical—or illogical—extension, plaintiff's argument must be that there was no response which Dr. Cole could have made which would not have implicated plaintiff's due process rights. According to plaintiff, Dr. Cole's refusal to discuss the matter until after the proceedings were concluded and/or her flat refusal to grant extra compensation were both improper. If she had immediately acceded to the panel's request and given them extra compensation, however, plaintiff would certainly be arguing that she was attempting to influence their decision.

evidence suggesting that the panel members' remuneration would not remain constant, whatever their decision, or that a decision in favor of plaintiff's dismissal would work to their financial advantage.

Thus, plaintiff's argument is based on sheer speculation, no more and no less. *See DeBlasio v. Zoning Board of Adjustment*, 820 F.Supp. 876, 881 (D.N.J. 1993) (quoting *Rite Aid Corp. v. Board of Pharmacy of N.J.*, 421 F.Supp. 1161, 1169 (D.N.J. 1976), *appeal dismissed*, 430 U.S. 951 (1977)) (participation of zoning board's secretary in hearings did not violate due process since secretary's interest in outcome of proceedings did not rise to level of direct, personal, substantial pecuniary interest because mere theoretical competition alone "has never been a sufficient predicate for an inductive conclusion of probable economic bias.").[7] While, of course, "the financial stake need not be as direct or positive as it appeared in *Tumey*", *Gibson*, 411 U.S. at 579, the pecuniary interest alleged here is light years removed from that found in *Ward* and *Tumey*, and simply too attenuated even under the rigorous standard this court must apply on a motion for summary judgment.[8] Stated somewhat differently, plaintiff has presented no evidence which raises a genuine issue of material fact regarding the panel members' partiality. Accord-

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[7] This speculation is evident in the language of plaintiff's submissions to the court: ". . . [t]his **could only bring home** to the Panel members that Susan Cole had total control of their financial futures". (Pl.Br. at 21); "[seeking additional compensation] from the same party [Dr. Cole] **could only have led them to believe** that they had a better chance . . . " (Pl.Br. at 20); and "[o]n the basis of [Cole's letters to panel members], **how could the panel members have concluded** that pleasing her was totally irrelevant?" Pl.Br. at 19 (emphasis added).

[8] Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. There is no issue for trial unless the non-moving party can demonstrate that there is sufficient evidence favoring the non-moving party so that a reasonable jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The role of the court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial". *Anderson*, 477 U.S. at 249.

ingly, this court adopts the findings and conclusion of the Magistrate Judge in this regard.

2. Appearance of Impropriety:

Plaintiff's second objection is that the panel members' participation in the hearings while "searching for more compensation" created an "appearance of impropriety". Pl. Br. at 26. *See Commonwealth Coatings Corp v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (arbitration panel "not only must be unbiased but must also avoid the appearance of bias."). Plaintiff cites *In re Murchison*, 349 U.S. 133, 136 (1955), in support of his argument that "justice must satisfy the appearance of justice". *Id.* at 136 (citing *Offutt v. United States*, 348 U.S. 11 (1954)); see also *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992) ("the polestar" governing disqualification of a judge is "impartiality and the appearance of impartiality."). While that proposition is eminently sound, it is far from clear that it applies in this case to panel members with no final decision-making authority, although this court will assume, with no great confidence, that it does.[9]

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[9] As the Magistrate Judge noted in his analysis, the test articulated in *Commonwealth Coatings* may not be applicable to the non-judicial adjudicators in this case. Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". The judge shall also disqualify him or herself "[w]here he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding". *Id.* at § 455(b)(1).

Some courts have found that arbitrators are not held to the ethical standards required of Article III judges articulated in 28 U.S.C. § 455. *See Lavoie*, 475 U.S. at 825-26 n.3 (Supreme Court declined to read *Tumey* as constitutionalizing any rule that a decision rendered by a judge with "the slightest pecuniary interest" constitutes violation of Due Process Clause" and overruled *Commonwealth Coatings* to the extent that it could be read to state otherwise); *see also Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993) (citing *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1254 (7th Cir. 1992) ("it is well established that a mere appearance of bias is insufficient to demonstrate evident partiality" on the part of an arbitrator). *But see Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust for*

As the Magistrate Judge noted, and as plaintiff does not dispute, in order to prevail on an "appearance of impropriety" due process claim under the test set forth in *Commonwealth Coatings*, 393 U.S. at 151-53, "plaintiff must establish: (i) that events occurred which would cause one to reasonably question the hearing Panel's partiality; and (ii) that the information was concealed from plaintiff". Report and Recommendation at 43-44 (citing *Commonwealth Coatings*).[10] The alleged partiality must be "direct, definite, and capable of demonstration rather than remote, uncertain or speculative". *Health Servs. Management*, 975 F.2d at 1264 (quoting *Florasynth Inc. v. Pickholz*, 750 F.2d 171, 173-74 (2d Cir. 1984)). The Magistrate Judge determined that neither prong had been satisfied.

Plaintiff attempts to satisfy the first prong of this test by claiming:

> [the] continuous negotiations, secret payments, the unquestioned control which Susan Cole asserted over the additional payments and which she conveyed to the panel members, the continued secret negotiations after the summer, the promise of Susan Cole that when the panel was finished with its business, and produced their report, "that we could discuss the matter again" as she testified in her deposition, and the actual payments after a favorable report was produced . . . [are] additional factors [which] would certainly cause "one" to reasonably question the Panel's partiality.

Southern California, ___ U.S. ___, 113 S.Ct. 2264, 2277 (1993) (requirement that justice must satisfy the appearance of justice applies where private party is given statutory authority to adjudicate a dispute, such as an arbitrator). Thus, there exists some real doubt as to whether the adjudicating panel members here can even be held to the stringent "appearance of bias" standard.

[10] In *Commonwealth Coatings*, an award was vacated after it was revealed that a neutral arbitrator in a construction dispute had an undisclosed ongoing business relationship with one of the parties, and had been retained as an engineering consultant for one of the construction projects involved in the dispute being arbitrated. 393 U.S. at 150.

Pl.Br. at 32. As discussed in the previous subsection, these factors, particularly when stripped of their sinister trappings, are insufficient to cause a reasonable person to question the panel's impartiality. Plaintiff alleges that the July 29, 1987 letters from Dr. Cole (*see* Second Cole Aff., Exh. B) to the panel members, advising of the initial grant of summer compensation and release time, were not provided to plaintiff. Even if plaintiff was not provided with these letters, or with notice of their contents, the letters clearly state that the reason for granting the panel's request for extra compensation was the unexpected length of the hearings.[11] Nothing in those letters suggests that further compensation would depend on the decision rendered by panel members, much less would it cause a reasonable person to so believe.

As for the second prong, and as the Magistrate Judge correctly found, the supposed "negotiations" regarding extra compensation were not "secret". Not only was plaintiff's representative aware of at least certain of the "negotiations", but sanctioned talks in this regard. *See* Report and Recommendation at 44-45 (citing memo dated March 5, 1987 to Professor Szatrowski from Wells Keddie, AAUP[12] counsel for

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[11] The letters to the panel members stated, in part:

> The time you have had to spend on this activity, and will continue to spend until the panel is prepared to make a report (in what I hope is the not-too-distant future), has certainly been significant. . . .
>
> It is certainly the case that the necessity to extend to a colleague the opportunity for this kind of hearing is a rare event in one's career, but one that is certainly within the obligations a faculty member has to the profession and to the University. Your efforts to date provide ample evidence of your acceptance of this responsibility. Nevertheless, **because of the unexpected length of the proceedings,** I have considered it appropriate, in consultation with the Office of the Provost, to change your appointment. . . . As a result of this change, your current salary . . . will be increased. . . .

Second Cole Aff., Exh. B-1 to B-5 (emphasis added).

[12] "AAUP" is the abbreviation for American Association of University Professors.

plaintiff, attached as Exh. A to Second Cole Aff.). In the same March 5, 1987 memo, counsel stated that, in addition to seeking summer compensation:

> . . . [a]nother possibility might well be worth considering: released time *after this is all over* to enable committee members to make up for considerable lost time, energy, and opportunity.

Second Cole Aff., Exh. A at 3. As the Magistrate Judge noted, this document indicates that plaintiff's personal attorney at the time, Ira M. Goldberg, was copied on the document. *See* Report and Recommendation at 45 n.22. Thus, plaintiff cannot complain that he was unaware that there might be "negotiations" regarding compensation for post-summer participation, given that his own representative suggested it as an option. Moreover, as the Magistrate Judge also noted, the affidavits of Professor Szatrowski and Mr. Goldberg, plaintiff's then-attorney, support the conclusion that it was no secret that the panel was attempting to get additional compensation. *Id.*

In *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), a case on which plaintiff relies, the Third Circuit ordered a district judge to disqualify himself because of a combination of factors which taken together created an appearance of partiality mandating disqualification.[13] These factors included attending "a predominantly pro-plaintiff conference on a key merits issue", which was indirectly sponsored by plaintiffs, largely with funding that the judge himself had approved and with the judge's expenses largely defrayed by the conference sponsors with those same court-approved funds. Moreover, at the conference the judge was exposed to a "preview" of plaintiff's case: thirteen of the eighteen witnesses plaintiffs were intending to call gave presentations

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[13] Plaintiffs had moved to disqualify the judge under 28 U.S.C. § 455(a) because "his partiality might reasonably be questioned," and 28 U.S.C. § 455(b)(1) because he had "personal knowledge of disputed evidentiary facts concerning the proceeding". *In re School Asbestos Litigation*, 977 F.2d at 781.

very similar to that to which they were expected to testify at trial. *Id.*, 987 F.2d at 782 (a reasonable person might question partiality of judge who attended "a predominantly pro-plaintiff conference on a key merits issue" that was funded by plaintiff and a reasonable person might suspect that a judge who has an opportunity to "preview" plaintiff's case is predisposed to plaintiff's position). Here, by contrast, plaintiff has raised no genuine issue of fact demonstrating that either the panel's impartiality could reasonably be questioned, or that any "negotiations" regarding extra compensation were concealed from plaintiff. Thus, assuming that an "appearance of impropriety" due process claim can even be raised here, the Magistrate Judge's finding of no appearance of impropriety was eminently correct.

3. Further Discovery:

Plaintiff argues that "[a]t the least, plaintiff should have been afforded the opportunity to question Professor Szatrowski in a deposition and determine exactly what was said between himself and Dr. Cole" regarding the request for extra compensation. Pl.Br. at 34. Plaintiff contends that although he noticed Professor Szatrowski's deposition in August, 1989, all discovery was stayed after November 1989 when these motions for summary judgment were filed. Plaintiff fails to explain why in this case in which there was massive discovery before the stay, Professor Szatrowski was not deposed at any time prior to August 1989 or why he was not one of those plaintiff chose to be deposed during the summer and fall of 1989 when he deposed nine other current and former officials and employees of Rutgers. Beyond that, of course, ample evidence makes clear that the "negotiations" were not "secret", and no further discovery is necessary in this regard. Accordingly, the court adopts the Magistrate Judge's findings and conclusions on plaintiff's due process claim.

B. First Amendment Speech and Petition Rights

Plaintiff alleges that the disciplinary proceedings and his subsequent dismissal were initiated against him in retaliation for the host of grievances and lawsuits he had instituted and complaints he had voiced against the University, activities protected under the First Amendment.[14] Parenthetically, there is some irony in the fact that plaintiff is able to raise this issue and require the University to defend only because he has been, to put it charitably, an extraordinarily squeaky wheel or, to put it uncharitably, a thorn if not a total pain in the side of the University.

The Magistrate Judge properly noted that, "[t]his circuit abides by a straightforward three step process in examining a public employee's claim of retaliation for engaging in protected activity". *Holder v. City of Allentown*, 987 F.2d 188,

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[14] These lawsuits, grievances, and verbal complaints brought against the administrators and/or the University by plaintiff are as follows:

(1) a 1983 grievance regarding the denial of a merit salary increase;

(2) a 1985 lawsuit against Rutgers regarding the retroactivity of a promotion;

(3) a 1985 defamation lawsuit against certain officials of the University;

(4) a 1986 lawsuit against the University and certain of its officials regarding the investigation and commencement of dismissal proceedings;

(5) plaintiff's 1977 statements in a school newspaper criticizing the University for inadequate ventilation in the Chemistry laboratories;

(6) plaintiff's testimony before a grand jury, in 1977 and 1978, regarding an investigation into the manufacture of illegal drugs in Rutgers' laboratories;

(7) plaintiff's disputes, between 1979 and 1986, with senior members of his department over their efforts to wrongfully obtain "inappropriate" percentages of his federal grants; and

(8) plaintiff's criticisms, in 1983-84, regarding a possible obstruction of justice by his faculty peers in their attempt to secure funding for a mass spectrometer.

Report and Recommendation at 19-20.

194 (3d Cir. 1993). The three step process is as follows: (1) plaintiff must show that the activity in question is one that was **constitutionally protected**; (2) plaintiff must then show that the protected activity "was a **substantial factor** in the alleged retaliatory action"; and (3) the burden then shifts to defendants who may defeat the claim by "demonstrating that the same action **would have taken place** even in the absence of the protected conduct". *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983) (emphasis added). Defendants contend that plaintiff's claim of retaliation fails at each step: plaintiff's "speech" at issue did not address matters of public concern; plaintiff failed to show that his "speech" was a substantial factor motivating his dismissal; and defendants have shown that plaintiff would have been dismissed in any event. Moreover, defendants contend that plaintiff is not entitled to further discovery on this issue. The court will address these objections in turn.

1. Public Concern Analysis:

The Magistrate Judge noted that ordinarily in a case of First Amendment retaliation in which the alleged retaliation is based on a plaintiff's expression through *speech*, the court must determine if that speech is protected under the First Amendment based on whether or not the speech can be fairly characterized as addressing a "matter of public concern". *Connick v. Myers*, 461 U.S. 138, 147 (1983). This threshold issue is to be decided by the court as a matter of law. The Magistrate Judge found, however, that plaintiff's conduct at issue involved not only speech, but the filing of grievances and lawsuits, activities which implicate the right to petition clause, rather than the free speech clause, of the First Amendment[15] and, under the right to petition clause, a plaintiff need

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[15] The First Amendment, in relevant part, states:

> Congress shall make no law . . . abridging the **freedom of speech**, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amend. I (emphasis added).

not satisfy the *Connick* public concern test. Because in his view plaintiff's claim involved the petition clause, the Magistrate Judge held that it should be analyzed under different principles than those customarily employed in cases involving public employees who are allegedly terminated for exercising their right to free speech. He concluded that because two Supreme Court cases did not apply the *Connick* analysis to claims based on First Amendment violations arising from the right to petition

> . . . insofar as plaintiff's First Amendment retaliation claim is based on his right to petition by filing a lawsuit, plaintiff has engaged in constitutionally protected activity as a matter of law. Thus. . . plaintiff has met his threshold burden in pursuing his First Amendment claim.

Report and Recommendation at 24. Defendants object, claiming that the filing of a grievance or a lawsuit must still be subjected to the *Connick* "public concern" analysis, and that plaintiff fails to meet that test.

The First Amendment right to petition is "an assurance of a particular freedom of expression," *McDonald v. Smith*, 472 U.S. 479, 482 (1985), which is "generally subject to the same constitutional analysis" as the right to free speech. *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-15 (1982)). In *McDonald*, 472 U.S. at 484-85, the Supreme Court declined to accept the position that the petition clause provided absolute immunity from damages from libel. The *McDonald* Court refused to read the petition clause in isolation and cautioned against elevating one First Amendment freedom over another:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional pro-

> tection to statements made in a petition . . . than other First Amendment expressions.

Id. at 485 (citations omitted). *See also McDonald*, 472 U.S. at 489-90 (Brennan, J., concurring).[16]

In *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the Seventh Circuit refused to accept an employee's argument that the First Amendment establishes an absolute right, divorced from any consideration of content, to file a grievance and thus petition the government for redress. That court concluded that, "[w]ere we to adopt [the] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*". *Id.*, 858 F.2d at 1261. The court continued, "such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form". *Id.*, 858 F.2d at 1262. Similarly, in *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S.

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16 As Justice Brennan commented:

> [t]he Court previously has emphasized the essential unity for the First Amendment guarantees:
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> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).
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> . . .
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> . . . we have recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression. [citations omitted].
>
> There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States.

McDonald, 472 U.S. at 489-90 (Brennan, J., concurring).

1029 (1990), the Seventh Circuit held that, "in deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern. . . ." *Id.*, 885 F.2d at 412. Indeed, many courts have found that right-to-petition claims are governed by the same interest-balancing principles as right to free speech claims. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) (per curiam); *Day v. South Park Independent School District*, 768 F.2d 696, 701-03 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986) ("we are hesitant to elevate such an employee's complaint to the level of constitutional protection merely because she has asserted it in the form of a grievance");[17] *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) ("[t]he question in this case is whether [plaintiff's] opposition to her demotion or her filing of this lawsuit are 'matters of public concern'. . . . The law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit."); *Altman v. Hurst*, 734 F.2d 1240, 1244 n.10 (7th Cir. 1984) (a private office dispute cannot be constitutionalized merely by filing a legal action). *Accord Boyle v. Burke*, 925 F.2d 497, 505 (1st Cir. 1991) ("absolute First Amendment protection is not accorded to any grievance a public employee files against

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[17] In *Day*, a teacher filed a grievance seeking review of an unfavorable evaluation. After learning that her contract with the school district had not been renewed, she claimed that she had been fired because of the grievance. The Fifth Circuit held:

> None of the Supreme Court cases cited by [the plaintiff] supports the proposition that her speech on a matter of personal concern, the act of an employee addressing her employment supervisors, is protected by the petition clause because she chose to clothe her address to them in a formal grievance, in the absence of any implication of the right to freely assemble or associate. Other decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition.

Day, 768 F.2d at 701.

an employer, without regard to content"); *Phares v. Gustafsson*, 856 F.2d 1003, 1009 (7th Cir. 1988) ("we . . . analyze an alleged violation of the petition clause in the same manner as any other alleged violation of the right to engage in free speech"); *Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir.), *cert. denied*, 469 U.S. 823 (1984) (in order to be protected speech, a public employee's grievance must touch upon matters of public concern).

In sum, the First Amendment's right to petition "is cut from the same cloth as the other guarantees of that Amendment[.]" *McDonald*, 472 U.S. at 482. This court can find no reason to create a hierarchy for the rights of speech and petition and apply *Connick* only to First Amendment claims implicating the right to free speech.

The Magistrate Judge, however, interpreted the Supreme Court's holdings in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), as providing support for a public employee's essentially absolute right to petition. *See* Report and Recommendation at 23 ("[i]mplicit in the Supreme Court's conclusion [in *California Motor Transport*] is that the subject of the cause of action need not be a matter of public concern to implicate First Amendment protection . . . the lawsuit in question may be based on purely self-serving and private concerns and *still* be entitled to First Amendment protection."). Those cases should not have been construed so broadly.

In *California Motor Transport*, 404 U.S. at 510, the Supreme Court recognized that the right to access to the courts is an aspect of the First Amendment right to petition the government for the redress of grievances. The Supreme Court thus concluded that the antitrust laws did not prohibit the filing of a lawsuit, regardless of the plaintiff's anti-competitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. *Id.*, 404 U.S. at 511, 513 ("[t]he right of access to the agencies and courts . . . is part of the right of petition protected by the First Amend-

ment"). The Court held that the antitrust laws could not be construed to prevent the rights of groups with common interests to "use the channels and procedures of state and federal agencies and court to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors". *Id.*, 404 U.S. at 511.

In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. at 743, the Supreme Court struck a balance between protected rights under labor law and the First Amendment right to institute legal proceedings. The Supreme Court held that the filing of a well-founded lawsuit may not be enjoined by the National Labor Relations Board as an unfair labor practice, regardless of the employer's motive, unless the suit lacks a reasonable basis in fact or law, in light of the need for access to the courts and in recognition of the employer's right to seek judicial protection from the tortious conduct of employees during a labor dispute. *Id.*, 461 U.S. at 741-42.

In neither case did the Supreme Court directly address whether or not the First Amendment confers upon public employees an absolute right, divorced from any consideration of content, to file employment-related grievances. The Court acknowledged that the First Amendment encompasses the right to petition the government for the redress of grievances, which in turn encompasses the right of access to the courts. The Court acknowledged as well that the right of access to the courts is an aspect of the First Amendment right to petition, and recognized that the petition clause "embraces a much broader range of communications addressed to the executive, the legislature, courts and administrative agencies" (*McDonald*, 472 U.S. at 488 n.2 (Brennan, J., concurring)). Not every lawsuit or grievance is protected, however, because remedies sought against baseless litigation do not violate the First Amendment's right to petition. *Bill Johnson's Restaurants*, 461 U.S. at 743.[18] Similarly, the cases which view a public

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[18] As the Supreme Court later noted in *McDonald*:

> Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to peti-

employee's right to petition as circumscribed by the "public concern" analysis find that "not every legal gesture—not every legal pleading—is protected by the First Amendment". *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 419 (7th Cir. 1988).

The Third Circuit declined to decide this issue in *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1075-77 (3d Cir. 1990). While acknowledging that *California Motor Transport* provided the strongest support for the notion that the right to petition was not subject to a public concern analysis, the Court noted that "although the [Supreme] Court stated that 'the right to petition extends to all departments of the Government,' (quoting *California Motor Transport*, 404 U.S. at 510), including administrative agencies, it is evident that the matters raised before the administrative agencies in *California Motor Transport* had some *communicative* content". *Bradley*, 913 F.2d at 1076 (emphasis added). Nonetheless, the Court would not "foreclose [plaintiff's] claim [that he was retaliated against in violation of his First Amendment right to petition for filing an administrative workmen's compensation claim] as a matter of law . . . .", noting that:

> [t]here is a general principle, the parameters of which have not yet been delineated, that resort to the courts falls within the First Amendment right to petition. . . . Arguably resort to an administrative tribunal, even for the non-communicative purpose of filing a personal injury claim, should be protected to the same extent.

Id.

As the Magistrate Judge observed, one district court has held, essentially with limited discussion, that the filing of a discrimination complaint involves "the right to access to the

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> tion is absolute. For example, filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.' *Bill Johnson's Restaurants*, [461 U.S. at 743]; *accord*, *California Motor Transport*, [404 U.S. at 513].

McDonald, 472 U.S. at 484.

courts" and, therefore, was an activity protected by the First Amendment, regardless of any "public concern" analysis. *See Fuchilla v. Prockop*, 682 F.Supp. 247, 261-62 (D.N.J. 1987) (citing *California Motor Transport, supra*); *accord Greenwood v. Ross*, 778 F.2d 448, 457 (8th Cir. 1985) ("filing of an EEOC charge and a civil rights lawsuit are activities protected by the First Amendment" and content of speech was not analyzed); *but see Yatvin*, 840 F.2d at 420 (Seventh Circuit rejected the contention that "every case of alleged discrimination can be presumed to contribute to the marketplace of ideas."); *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990), *on remand*, 914 F.2d 258 (6th Cir. 1990).

Thus, whether the filing of a grievance or a lawsuit constitutes a right to petition worthy of absolute First Amendment protection is a complex issue which has split the circuits. Given *McDonald*, however, this court does not accept the Magistrate Judge's conclusion that the filing by plaintiff of his grievances and lawsuits constituted *per se* protected activity under the First Amendment without regard to their contents. It is, therefore, appropriate to determine if matters of public concern were at issue in these grievances and lawsuits as well as in the other vehicles plaintiff utilized.

To determine whether employee speech touches on a matter of public concern, the court must look at whether it can be "fairly considered as relating to any matter of political, social, or other concern to the community". *Holder*, 987 F.2d at 195 (quoting *Connick*, 461 U.S. at 146). This examination requires analysis of the "content, form and context of a given statement, as revealed by the whole record". *Connick*, 461 U.S. at 147-48 (footnote omitted). When the content of the speech focuses on disclosing public malfeasance or wrongdoing, it is likely to be considered a matter of public concern. *See Schalk*, 906 F.2d at 495. Conversely, speech is generally not protected if its aim is simply to air grievances of a purely personal nature. *Id.* The relevant inquiry, then, is whether the plaintiff is speaking as a citizen or an employee. *Connick*, 461 U.S. at

147. Significantly, it is not enough that the topic of speech be of general interest to the public but, rather, what is actually said must meet the public concern threshold.[19]

Here, plaintiff's speech took several forms: lawsuits filed against the University, grievances filed with the University, comments made to the school newspaper, disputes with University members, grand jury testimony, and general verbal criticisms. *See supra*, footnote 14. After reviewing the "content, form and context" of plaintiff's "speech", it is clear that plaintiff's 1983 grievance regarding the denial of a merit salary increase and his 1985 lawsuit regarding the retroactivity of a promotion addressed matters of purely private concern—plaintiff's salary and promotion status. Plaintiff has asserted in previous briefs that this grievance and lawsuit fall within the ambit of *Connick* because the AAUP spokesperson, Wells Keddie, stated that they had "significance for the bargaining unit as a whole". While speech which is related to collective bargaining activity may be a matter of public concern (*see Colburn v. Trustees of Indiana University*, 973 F.2d 581, 586 (7th Cir. 1992)), Keddie's statement alone does not permit the court to conclude that this grievance and lawsuit raised issues of public as opposed to private concern, as nothing in the record indicates that the central reason for the grievance and the lawsuit related to plaintiff's union affiliation. *See Gray*, 885 F.2d at 411 (union grievance about employee's rate of pay, working conditions, and sexual harassment matters of private concern); *Phares*, 856 F.2d at 1009 (grievances complaining of accrued vacation time and harassment involved personal, not public, concerns).

Similarly, the 1985 defamation suit against certain University officials as well as the 1986 lawsuit against the University and certain officials regarding the investigation and

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[19] If the court finds that the speech at issue involves a matter of public concern, the court must employ a balancing test, weighing the interests of a plaintiff in commenting upon matters of public concern against the interests of the employer in maintaining the effective operation of the workplace. *See Pickering v. Board of Education*, 391 U.S. 56 (1968); *Czurlanis*, 721 F.2d at 105.

commencement of dismissal proceedings do not implicate issues of public concern, as they concerned allegedly defamatory statements made only against plaintiff and an employment personnel decision individually affecting plaintiff. These lawsuits have not been shown to be anything other than an attempt to advance—or maintain—plaintiff's personal employment situation. *Accord Griffin v. Thomas*, 929 F.2d 1210, 1214-15 (7th Cir. 1991) (employee's complaint about performance status rating addressed matter of purely private concern); *Day*, 768 F.2d at 701 (where untenured teacher claimed her contract was not renewed because she filed grievance regarding her principal's unfavorable performance evaluation, court held "[a]s a matter of law. . . [plaintiff's] complaint about her individual teaching evaluation and the principal's explanation of it is not protected speech under the first amendment.") (footnote omitted); *Leachman v. Rector & Visitors of U. of Virginia*, 691 F.Supp. 961 (W.D.Va. 1988), *aff'd without opinion*, 915 F.2d 1564 (4th Cir. 1990) (University librarian's challenge to reassignment and reduction in faculty appointment was motivated by and directed at his own personal employment situation, and is not protected); *Martinez v. Cotulla Independent School Dist.*, 700 F.Supp. 17, 18 (S.D.Tex. 1988), *aff'd without opinion*, 922 F.2d 839 (5th Cir. 1990) (where plaintiff argues that she was fired for filing grievance over her failure to receive pay increase, there is no evidence showing that grievance addressed matters of public concern and summary judgment on this claim is granted in favor of defendant); *Yatvin*, 840 F.2d at 420 (court distinguished between cases that "seek relief against pervasive or systemic misconduct by a public agency [or are] . . . part of an overall effort by the plaintiff or by persons or groups allied with her to correct allegedly unlawful practices or bring them to public attention," and the "run-of-the-mill single-plaintiff discrimination case."); *Swick v. City of Chicago*, No. 92 C 1650, 1992 WL 293285 (N.D.Ill. October 13, 1992) ("[d]etermining whether an employee's speech is a matter of public concern requires us to consider if the speaker is speaking

more like a citizen or a disgruntled employee whose statements are primarily of personal interest."); *Arvinger v. Mayor & City Council of Baltimore*, 811 F.Supp. 1121, 1124-25 (D.Md. 1993) (where plaintiff filed suit and testified on his own behalf in sex discrimination suit for personal reasons, i.e., to be reinstated to his position as a school policeman, rather than in an effort to further public debate about issues of broad public concern, where he sought damages for himself rather than broad injunctive relief, and where he made no claim about systemic injustice, court held that neither filing of lawsuit nor plaintiff's testimony constitutes speech about matter of public concern, and neither is protected by First Amendment).

However, with regard to plaintiff's 1977 statements in a school newspaper criticizing the University for inadequate ventilation in the Chemistry laboratories; plaintiff's testimony before a grand jury, in 1977 and 1978, regarding an investigation into the manufacture of illegal drugs in Rutger's laboratories; plaintiff's criticisms, in 1983-1984, regarding a possible obstruction of justice by his faculty peers in their attempt to secure funding for a mass spectrometer by deceiving federal funding agencies; and his disputes between 1979 and 1986 with senior members of his department over their efforts to wrongfully obtain "inappropriate percentages" of his federal grants, deal with matters in which plaintiff may not have had an exclusively personal interest. This "speech" may well have been instituted within the context of a more general critique of the University's policies and administrative structure rather than have been solely addressed to plaintiff's personal situation. For example, plaintiff complained that the Chemistry Department wished to impose a tax on each faculty member receiving federal grants, not just upon him. *See Knapp v. Whitaker*, 757 F.2d 827, 842 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985) (teacher's speech on ineffectiveness of school's grievance procedures during ongoing collective bargaining negotiations, inequitable mileage allowances for coaches, and inadequate liability insurance are

matters of public concern when they "could very well have a direct financial impact upon the entire taxpaying community."). Therefore, the speech at issue in these instances meets the threshold criterion of "public concern" and constitutes speech worthy of First Amendment protection.[20]

2. Substantial Factor in Dismissal:

The second step in analyzing a public employee's claim of retaliation for engaging in protected activity is whether the protected activity "was a substantial factor in the alleged retaliatory action". *Czurlanis*, 721 F.2d at 103. *See also Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The Magistrate Judge found that a plaintiff may satisfy the "substantial factor" test either:

> '*indirectly* by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or *directly* through evidence of retaliatory animus directed against a plaintiff by the defendant.'

Report and Recommendation at 27 (quoting *Taitt v. Chemical Bank*, 849 F.2d 775, 777 (2d Cir. 1988) (citation omitted)). In *Jalil v. Avdec Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990), the Third Circuit similarly held that to establish a *prima facie* case of retaliatory discharge in

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[20] The court notes that, as stated previously, even if a public employee's speech touches upon a matter of public concern, the employer may constitutionally discharge the employee for that speech if the government's interest in the "effective and efficient fulfillment of its responsibilities to the public" outweigh the employee's interest in speaking. *See Connick*, 461 U.S. at 150-51; *see also Pickering*, 391 U.S at 568 (stating that a court must balance the interests of a public employee in speaking on matters of public concern with the state's interest "in promoting the efficiency of the public services it performs through its employees."). Defendants have neither argued nor presented any evidence that plaintiff's conduct disrupted the University workplace and, thus, do not invoke this balancing of interests. Rather, defendants argue that plaintiff's speech had nothing to do with his dismissal.

the context of a discrimination claim, plaintiff must show: (1) that he engaged in a protected activity; (2) that he was discharged subsequent to or contemporaneously with such activity; and (3) that a causal link exists between the protected activity and the discharge. *See also Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 327 (1991); *Garvey v. Dickinson College*, 775 F.Supp. 788, 796 (M.D.Pa. 1991) (quoting *Bennun v. Rutgers, The State University*, 737 F.Supp. 1393, 1400 (D.N.J. 1990), *rev'd on other grounds*, 941 F.2d 154 (3d Cir. 1991)) (causal connection "may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.").

The Magistrate Judge concluded that plaintiff was entitled to the benefit of the inference that the retaliatory conduct, i.e., the filing of charges against him, occurred in relatively close proximity to his protected activities because plaintiff engaged in those protected activities as late as 1985 and 1986, and throughout 1986 the University investigated the charges which were eventually detailed in the President's October 1, 1986 charging document.

The two "protected activities" specifically noted by the Magistrate Judge were plaintiff's lawsuits filed in 1985 and 1986, both of which this court has found failed to satisfy the first step of this analysis. Query, though, whether the statements which this court *has* found to be protected activity constituted a "substantial factor" in plaintiff's dismissal. Because there are no other indicia of retaliation, the inference of retaliation plaintiff would have this court draw must rest entirely on the nearness in time of these statements to the 1986 investigation and initiation of charges against him. Caution is required, however, before drawing such an inference. Courts have not defined a precise time beyond which an inference of retaliation may not be drawn in the absence of affirmative evidence of retaliatory animus. However, courts have found a *prima facie* case of retaliation based on the nearness in time between a protected action and a discharge. *See, e.g., Jalil,*

873 F.2d at 708-09 (plaintiff established a *prima facie* case of retaliatory discharge once he established the causal link between protected activity of filing discrimination suit and discharge by "the circumstance that the discharge followed rapidly, only two days later."); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731-32 (9th Cir. 1986) (in Title VII claim, two months between protected activity and allegedly retaliatory discharge); *Love v. Re/Max of America, Inc.*, 738 F.2d 383, 386 (10th Cir. 1984) (2 hours); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980); *but see Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (mere fact that plaintiff was discharged four months after filing discrimination claim was insufficient to support inference of retaliation).

Here, plaintiff's disputes with senior Chemistry Department personnel spanned the period from 1977 to 1986 and the University brought charges against him in 1986. As the Magistrate Judge noted, University administrators were aware of his disputes and grievances. At least as to plaintiff's disputes in or about 1986, plaintiff has presented sufficient evidence to raise an inference of retaliation, albeit certainly not as convincing as that in *Holder*, 987 F.2d at 196 (plaintiff satisfied burden that officials engaged in retaliatory conduct by enforcing residency requirement where retaliation occurred three days after plaintiff engaged in protected activity, after having not been enforced for fourteen years).[21] *See Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988).

Defendants contend that temporal proximity alone is insufficient to establish a *prima facie* case of retaliation because plaintiff has failed to show any causal connection between his protected activities and the University's institution of charges against him. Certainly, plaintiff's evidence of retaliatory treatment is anything but strong. Nevertheless, viewing all infer-

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[21] The remaining "protected activities" emanated from 1977, 1977-78, and 1983-84 respectively. No reasonable jury could infer that any of those activities was a substantial factor motivating the alleged retaliatory conduct in 1986.

ences in the light most favorable to plaintiff, as this court must, plaintiff has met his burden, albeit barely, of establishing a *prima facie* case of retaliation—that is, he has presented sufficient evidence of the proximity to certain disputes to show that his discharge may have had its roots in those disputes. *Accord Taitt v. Chemical Bank*, 849 F.2d at 778.

3. Pretext:

The third and last step in the three step process is to determine whether defendants have demonstrated that, in the absence of the protected conduct, the discharge would have occurred in any event. *See Czurlanis*, 721 F.2d at 103. The Magistrate Judge found that, while defendants have a strong factual case supporting their contention that plaintiff was dismissed for his misconduct, misconduct completely unrelated to his First Amendment protected activities, summary judgment should be denied under Fed.R.Civ.P. 56(f),[22] because plaintiff had not had an adequate opportunity "to explore for evidence in defendants' possession "which would establish that defendants' proffered explanation was indeed pretextual". Report and Recommendation at 30.

Defendants object to the Magistrate Judge's conclusion, and contend that, as relevant here, plaintiff received all of the discovery to which he was entitled, and point, most particularly, to a court ordered Stipulation entered into by the parties on May 18, 1989.[23] That Stipulation provided, in pertinent part, that plaintiff "would receive for each faculty member regarding whom dismissal proceedings have been commenced under

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22 Fed.R.Civ.P. 56(f) states, in pertinent part:

> Should it appear from the affidavit of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit . . . discovery to be had or may make such other order as is just.

23 It does not appear, at least to this court, that the Stipulation necessarily foreclosed additional discovery.

University Regulations 3.91 *et seq.*, by recommendation at any level designated in University Regulation 3.94, a document or documents fully reflecting the nature of the charges and a document fully reflecting the disposition, since 1976", and "for each faculty member regarding whom a complaint of sexual harassment has been filed . . . the complaint and a document fully reflecting the disposition, since 1979". Second Celauro Affidavit, Exh. K. These documents were to be produced not later than June 9, 1989. *Id.*

On June 9, 1989, a host of documents responsive to the above were produced. *Id.*, Exh. L. Thereafter, plaintiff's voluminous discovery demands persisted without let up until defendants filed their motion for summary judgment on November 29, 1989, with discovery stayed until resolution of that motion and the cross-motions which ensued.

Plaintiff argues that he "must see the records of other faculty persons similarly situated (*i.e.*, persons who have been known to commit, or were accused of committing, similar offenses, but against whom no sanctions, or not as severe a sanction was imposed). With this information, a Court will be able to make the comparison, to see whether the difference in treatment is proof of the improper animus". Exh. 26 to Friedman Aff. of Jan. 15, 1990, at 3-4. The Magistrate Judge agreed. Report and Recommendation at 30, n.14.

This court disagrees. First, faculty members "similarly situated" to plaintiff are those faculty members against whom formal charges have been filed as to conduct which could lead to dismissal under the University's regulations. Plaintiff received all such information on June 9, 1989 pursuant to defendants' compliance with Section I.1 of the Stipulation of May 19, 1989. Second, while at first blush plaintiff's definition of "similarly situated" seems somewhat plausible, when one remembers the conduct for which plaintiff was dismissed, this definition is utterly inappropriate. Plaintiff was dismissed from the University on the basis of the following nine charges found by the hearing panel and the Board of Governors to be true.

"1. San Filippo caused two visiting scholars from the People's Republic of China, who were working in his laboratory at the University, to perform involuntarily and without compensation, gardening and cleaning work at his home. (Second Amended Complaint, Exh. B, pp. 14-19).

2. San Filippo represented to a visiting scholar from the People's Republic of China that he would deduct $700.00 from his promised salary to purchase health benefits coverage but, despite the salary reduction, San Filippo neither arranged for health benefits coverage nor advised the visiting scholar that health benefits coverage had not been purchased. (Second Amended Complaint, Exh. B, pp. 19-20).

3. San Filippo threatened and harassed visiting scholars from the People's Republic of China by repeatedly stating he would sent them back to China and by directing abusive language toward them. (Second Amended Complaint, Exh. B, pp. 21-23).

4. San Filippo interrupted without cause a laboratory class being conducted by a Chinese teaching assistant and treated her in an unprofessional, threatening, and abusive manner, within the hearing of other individuals, including her students. (Second Amended Complaint, Exh. B, pp. 23-24).

5. San Filippo directed a Chinese visiting scholar, who had injured himself while doing maintenance work at San Filippo's home, to identify himself as another Chinese visiting scholar at Middlesex Hospital in order to have the former covered by the latter's medical insurance. (Second Amended Complaint, Exh. B, pp. 24-25).

6. San Filippo permitted an employee under his supervision to submit a false time report for the purpose of being paid for a time period which she had not worked. (Second Amended Complaint, Exh. B, pp. 26-28).

7. San Filippo brought to the University as a post-doctoral fellow, to be paid a stipend from San Filippo's National Science Foundation grant, an individual from the People's Republic of China whom San Filippo knew was not qualified to be a post doctoral fellow, i.e. he did not have a doctoral degree. (Second Amended Complaint, Exh. B, pp. 29-31).

8. San Filippo submitted an application for admission to graduate school, including letters of reference, on behalf of a Chinese visiting scholar working in his laboratory. One of the letters of reference was purportedly written and signed by one Liu Guozhi. San Filippo knew, but did not make known when he submitted the letter, that, in fact, it was not prepared by Liu Guozhi. (Second Amended Complaint, Exh. B, pp. 31-33).

9. San Filippo permitted three individuals to work in his laboratory contrary to the specific written instructions of his Department chair. (Second Amended Complaint, Exh. B, pp. 33-34)."

Second Celauro Affidavit, Exh. J at 8-10. These charges *together* caused plaintiff's dismissal and it is only that tenured faculty member who had "been known to commit" or was "accused of committing" offenses of the kind, number, and scope *taken together* with whom plaintiff is truly "similarly situated". No one suggests that such a person exists.

Hence, the flaw in plaintiff's argument and the Magistrate Judge's conclusion that additional "relevant" discovery was not provided. Report and Recommendation at 30.[24] Whether

[24] In a nutshell, plaintiff sought, and the Magistrate Judge would presumably authorize, anything in the University records related in any way to a complaint about any faculty member on any ground at almost any time. Thus, for example, plaintiff sought information as to whether the University administration had ever received a written complaint that a tenured faculty member insulted, intimidated, harassed or humiliated a student or employee; disobeyed an order of a chairperson or dean; translated and submitted a letter on behalf of an applicant for a graduate program which the faculty member alleged to be a translation of a foreign

defendant has information that at one time one person was sanctioned or not sanctioned for an act of misconduct which parallels or was more serious than one of the acts which plaintiff committed is simply irrelevant to whether plaintiff was appropriately sanctioned for committing *all* of those acts. It goes without saying, of course, that effectively requiring defendant to open its files of many years would be extraordinarily burdensome and oppressive. Plaintiff has already received all the discovery to which he was entitled—and more.

There is utterly no basis in this record upon which to conclude that plaintiff's dismissal on the nine charges was a pretext for his exercise of protected speech, and utterly nothing which could lead the trier of fact to believe that this might be so. The Magistrate Judge's recommendation that defendants' motion for summary judgment on this claim should be denied is rejected.

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language text, but which, in fact, contained representations not in, or omitted from the original text; became aware of other faculty members who were assisted by students or subordinate fellow employees in performing acts of labor at the faculty member administrator's home or apartment; received complaints relating to the misconduct of a tenured faculty member that was so disruptive that the police were summoned; received complaints relating to a faculty member being accused of stealing or inducing students to steal supplies or food from the University; where a faculty member allegedly violated the University's internal administrative policies, practices and procedures; where other faculty members and administrators violated professional and ethical standards by bringing to the University as post-doctoral fellows scholars who did not have the appropriate credentials; where a faculty member or administrator allegedly exploited students of subordinate employees; where other individuals were knowingly mistitled during their period of residence at the University in order to compensate them for services rendered to the University; information relative to time reports that were filed that did not accurately reflect the time worked by the employee/student named; information where faculty members engaged in conflicts of interest involving their personal gain; information on how "Type 4" employees were to be compensated beyond their proscribed work week;—and on and on it goes. (Exh. 26 to Friedman Aff. of 1/15/90 at 2 *passim*).

C. Equal Protection Claim

Defendants object to the Magistrate Judge's denial of summary judgment on plaintiff's equal protection/selective enforcement claim. The Magistrate Judge correctly determined, however, and the parties agreed, that the First Amendment retaliation and equal protection/selective enforcement claims "must stand or fall together". Report and Recommendation at 31. Accordingly, having determined that the Magistrate Judge should have concluded that defendants' motion for summary judgment on plaintiff's First Amendment claim should be granted, summary judgment on the equal protection claim will be granted.

IV. CONCLUSION

For the foregoing reasons, the court affirms and adopts the recommendations of the Magistrate Judge in part, and rejects the recommendations in part. In sum, the court denies plaintiff's motion for partial summary judgment and grants defendants' motion for summary judgment on the Third Amended Complaint.

An appropriate order shall issue.

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: September 28, 1993

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5658

JOSE SAN FILIPPO, JR.,

Appellant

VS.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, RUTGERS UNIVERSITY,

Appellees

RUTGERS COUNCIL OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Amicus Curiae

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS and MCKEE, *Circuit Judges*, and POLLAK, *District Judge**.

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker, Hutchinson and Scirica would have granted rehearing.

BY THE COURT,

/s/ TIMOTHY K. LEWIS
Circuit Judge

Date: August 18, 1994

APPENDIX F

OPINION OF THE BOARD OF GOVERNORS

IN THE MATTER OF THE PROCEEDINGS TO DISMISS PROFESSOR JOSEPH SAN FILIPPO, JR.

May 13, 1988

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May 13, 1988

OPINION OF THE BOARD OF GOVERNORS IN THE MATTER OF THE PROCEEDINGS TO DISMISS PROFESSOR JOSEPH SAN FILIPPO, JR.

This Opinion sets forth the reasons for the final decision of the Board of Governors ("the Board") in the matter of the proceedings to dismiss Professor Joseph San Filippo, Jr. The University Senate Panel recommended his dismissal and the Board herein affirms that recommendation and directs that Professor Joseph San Filippo, Jr., be dismissed from the University, for the reasons given below.

I. *Procedural History*

In accordance with University Regulation 3.94[1], on January 6, 1986, the Dean of the Faculty of Arts and Sciences, Tilden G. Edelstein, wrote to Professor San Filippo, a tenured member of the Chemistry Department, to advise him that complaints alleging harassment, exploitation, attempted exploitation and fraud had been made against him by several visiting scholars from the People's Republic of China. Dean Edelstein had previously met with Professor San Filippo and his Rutgers Council of American Association of University Professors Chapters advisor, Wells Keddie, on November 25, 1985 to discuss informally the complaints that had been made against him. At that time, Professor San Filippo requested a written specification of the charges against him and this was provided in Dean Edelstein's January 6, 1986 letter to Professor San Filippo, which also requested Professor San Filippo's written response to the charges. Such written responses were made by Professor San Filippo on January 20 and February 11, 1986.

In accordance with University Regulation 3.94, Dean Edelstein wrote to Professor Joseph Potenza, Acting Chair of the Chemistry Department, on January 24, 1986 requesting the

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[1] University Regulations 3.93-3.99a, set forth in Appendix A, detail the procedure to be allowed in the dismissal proceedings of a tenured faculty member.

advice of the tenured faculty of the Chemistry Department on the issues raised by the charges. On February 5, 1986, Professor Potenza sent a memorandum to the tenured faculty of the Chemistry Department advising them of the charges made and of Professor San Filippo's responses to them. On February 14, 1986, the tenured faculty of the Department met and passed the following resolution, which was communicated to Dean Edelstein and to Professor San Filippo by Professor Potenza's letter to Dean Edelstein, dated February 19, 1986:

> "In our view, the allegations against Professor J. San Filippo referred to in the letter of January 6, 1986 from Dean Edelstein to Professor San Filippo and in the supporting documents that accompany the Dean's letter or that have been provided to us by the Chair, if sustained, represent serious violations of the statement on Professional Ethics in University Regulation 3.91 and gross neglect of established university and departmental obligations. It appears to us that many of the allegations made in this case are of actions that are inconsistent with and antithetical to membership in an academic community. If these allegations are sustained they could represent grounds for dismissal of Professor San Filippo.
>
> "Our examination of the written record of this case and of Professor San Filippo's responses to the allegations has not so far convinced us of the falseness of the allegations. Accordingly we advise you, as Professor San Filippo himself requests in his letter of January 20, 1986, that he 'receive a meaningful opportunity to defend [him]self.' We advise you to make available to Professor San Filippo the procedure outlined in University Regulations 3.94-3.99a, providing all appropriate due process protections, so that either he can clear himself of these most serious allegations, or should the allegations be sustained, that appropriate action can be taken by the University. Because of the gravity of this situation and its impact on the careers of several people, we urge you [to] proceed in this matter as quickly as possible."

In accordance with University Regulation 3.94, Dean Edelstein then conveyed the Chemistry Department's Resolution to Provost Kenneth W. Wheeler by letter dated February 26, 1986, and in turn, Provost Wheeler then wrote to T. Alexander Pond, Executive Vice President and Chief Academic Officer, by letter dated April 2, 1986, stating that the charges against Professor San Filippo were "sufficiently grave to warrant his dismissal from the University."

On September 9, 1986, and in accordance with University Regulation 3.94, Dr. Pond wrote to President Edward J. Bloustein, informing him that after his review of the matter, he had concluded that the six major charges which emerged after the investigation provided "a sufficient basis for Professor San Filippo's dismissal from the University." Furthermore, in his letter, Vice President Pond recommended that [President Bloustein] "take the appropriate action to recommend his dismissal to the Board of Governors."

On October 1, 1986, in accordance with University Regulation 3.97, President Bloustein wrote to Professor San Filippo informing him that he had reviewed the recommendations of the Executive Vice President and Chief Academic Officer and of the Appointments and Promotion Committee of the Faculty of Arts and Sciences[2] and the accompanying exhibits. After such review, President Bloustein further stated in his October 1, 1986 letter to Professor San Filippo that the charges made met "the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 and constitute gross neglect of established university obligations appropriate to your appointment and evidence a failure to maintain standards of sound scholarship and competent teaching."

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[2] The Appointments and Promotion Committee issued a statement dated September 23, 1986 recommending that dismissal proceedings be brought against Professor San Filippo, which statement was conveyed to President Bloustein by Dean Edelstein's letter of September 25, 1986.

Specifically, President Bloustein advised Professor San Filippo of the six charges[3] which are individually discussed in Section II of this Opinion. In his October 1, 1986 letter, President Bloustein further advised Professor San Filippo of his right to a hearing with respect to the charges, as specified in University Regulation 3.97. Professor San Filippo elected to have such a hearing. University Regulation 3.98 sets out the requirements for the selection of the five member hearing panel, to be "selected by lot from the University Senate" after the parties have, if they wish, exercised "a reasonable number of challenges" to the membership of the panel. Each side was permitted fifteen peremptory challenges as well as unlimited challenges for cause, and by agreement by both sides, the pool for the panel was limited to tenured members of the University Senate. Professor San Filippo's attorney used 15 peremptory and 6 for-cause challenges; the President's attorney used 11 peremptory challenges and did not use any for-cause challenges. The panel, as finally constituted, was made up of the following tenured faculty members: Noel DaCosta, Music Department, Mason Gross School of the Arts; Mary Fetzer, University Library; Richard Hixson, School of Communication, Information, and Library Studies; Ted H. Szatrowski, Graduate School of Management; and David Wilder, Psychology Department, New Brunswick Faculty of Arts and Sciences.

The selection of the University Senate Panel began on October 24, 1986 and was concluded on November 7, 1986. The Panel held its first meeting on December 5, 1986, at which time Professor Szatrowski was chosen by the panelists as Chair of the Panel. The Panel held twelve meetings prior to the first session of the hearings, including two meetings with the attorneys for the President (John J. Peirano) and for Professor San Filippo (Ira M. Goldberg), to set procedural guide-

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[3] The President's charges are listed in Appendix B. The Exhibits appended to the President's October 1, 1986 letter to Professor San Filippo contain the correspondence detailed in this Opinion's Section I. Procedural History.

lines for the hearings. By letter dated December 5, 1986 to the two attorneys, Professor Szatrowski reported that the Panel had adopted the following procedures for the conduct of the hearing sessions to comply with the requirements of due process:

> 1. The hearing shall be conducted at such times and places as the Panel shall determine, subject to the consideration that this matter should be resolved expeditiously.
>
> 2. The hearing shall not be public unless the faculty member concerned so requests.
>
> 3. The faculty member concerned and the President's representative shall each have the right to present witnesses and other evidence to the Panel.
>
> 4. The faculty member concerned, the President's representative, and the members of the Panel shall each have the right to question witnesses.
>
> 5. The admissibility of testimony and other evidence shall be determined by the Panel on the basis of its relevance and materiality.
>
> 6. The Panel shall determine any other matters concerning its procedures that may arise during the course of the hearing.
>
> In addition, it is our understanding that the hearing shall be recorded stenographically.

The Panel hearings began on March 24, 1987, and after 46 days of hearings involving approximately 250 scheduled hours, it concluded with closing arguments on September 22, 1987. Thirty-three witnesses appeared before the Panel and over 400 exhibits were admitted into evidence. The complete transcript of the hearing numbered over 5,800 pages (exclusive of exhibits). The President's attorney rested his case after sixteen days of hearings. On July 28, 1987, which was the

eighteenth day of the presentation of Professor San Filippo's case, according to the report of the Panel:

> . . . the Panel announced to both sides its concern for the length of time that the hearings were taking. During a break in the hearings from July 29 through August 30, the Panel requested that both parties submit to the Panel a list of any additional witnesses that they planned to call, with a brief description of what each witness would testify to, in sufficient detail so the Panel could decide whether or not this information was relevant and material to the matter before the Panel. Based on the information received by the Panel, the Panel decided that nine more days of hearings should provide both sides ample opportunity to conclude their evidentiary presentation. Equal time was allocated to both sides for these scheduled nine days. The Chair timed each side with a chess clock, allocating time to each party depending upon which party currently was presenting. Cumulative time was announced at the end of each day of hearing. (Senate Panel Report, p. 3)

When the hearings concluded, the President's case (including direct and cross-examination of various witnesses) occupied approximately 2005 pages of the hearing transcript, while Professor San Filippo's case occupied approximately 3023 pages of the transcript. Of that 3023 pages, in addition to those pages devoted to Professor San Filippo's other witnesses, 1052 pages were devoted to Professor San Filippo's own direct testimony, and his own cross-examination covered an additional 919 pages. In all, Professor San Filippo himself appeared in direct testimony on 13 days, and on cross-examination for 10 days (with 3 of those days containing both direct testimony and cross-examination).

According to the Panel Report, after the hearings concluded on September 22, 1987, the Panel held twelve meetings to deliberate and prepare its report. The Report of the University Senate Panel, dated December 21, 1987, was received by the

University on December 22, 1987. The Report was prepared in accordance with University Regulation 3.99.

> The panel shall determine whether the charges, or any part thereof, are true; whether the matters charged and proved constitute ground for dismissal under section 3.93 above; and whether, taking into consideration the respondent's previous record and his value to the University, he should be dismissed or otherwise disciplined.

A copy of the Report was distributed by letter dated December 23, 1987 from the Chairman of the Board, Michael Bongiovanni to the Members of the Board of Governors, in accordance with University Regulation 3.99a. Copies of the Report were also sent by the Vice President and Secretary of the Board of Governors, Jean W. Sidar, to the attorneys for each side on December 22, 1987.

The Senate Panel Report concluded that "all or parts of Charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5 and 6 [were] true" (the charges were numbered as they had been in the President's October 1, 1986 letter to Professor San Filippo, and in addition the Panel added Charge 3c: "Ms. Brownawell was inappropriately paid for the week ending November 9, 1984"). After reviewing the evidence on all the charges, the Panel concluded:

> . . . that Professor San Filippo violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, Professor San Filippo failed in his responsibilities to the University. The Panel concludes that the "matters charged and proved" meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99, as evidenced by his exploitation of and threatening and abusive behavior towards individuals who worked under him in a professional capacity and his lack of integrity in professional dealings. (Senate Panel Report, p. 42)

The Panel is charged under University Regulation 3.99 to specifically take "into consideration the respondent's previous record and his value to the University" and recommend whether "he should be dismissed or otherwise disciplined." In accordance with this mandate, the Panel Report concluded with the following recommendation to the Board of Governors:

> "Professor San Filippo has an excellent record as evidenced by his long list of publications and promotion to the rank of Professor in 1984 [F-60][4]. He has received over a million dollars in research grants and awards. He has worked with industry to bring together funding for equipment at Rutgers. He is an active researcher with an international reputation and a senior member of the Chemistry Department. His research accomplishments are an asset to the University's quest for excellence and distinction. There is no doubt that Professor San Filippo has made positive contributions to the University.
>
> "However, based on our findings and the evidence presented at the hearings, we find that Professor San Filippo has exploited, threatened and been abusive of individuals who have worked under him in a professional capacity. In addition, we find that Professor San Filippo has demonstrated a serious lack of integrity in his professional dealings. His excellent research record and his contribution to the University are laudatory, and were considered by the Panel in reaching its decision. The Panel unanimously recommends, however, that Professor San Filippo be dismissed from the University." (Senate Panel Report, p. 43)

The Panel Report concluded with the following observation:

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[4] References to Exhibits admitted by the Senate Panel refer to F (Faculty Member) or U (University) and the specific number of the Exhibit. (Here, Faculty Member Exhibit Number 60.)

> Throughout these proceedings, the Panel has felt particular concern for pressures on all of the Chinese scholars that have been involved in the matter before the Panel. Coming to a foreign land to study can be unsettling enough, but to become embroiled in a dismissal proceeding can do nothing to aid their scholarship or personal well-being, or the reputation of the University. We urge the University to avail itself to the fullest to be supportive of foreign scholars and to be sensitive to the pressures that can be placed on them, both willingly and unwittingly, because of their inexperience with our culture and their dependence on their faculty sponsors and the University as a whole. (Senate Panel Report, p. 44)

On December 23, 1987, Jean W. Sidar, Vice President and Secretary of the Board of Governors, wrote to both attorneys, on behalf of Chairman Michael Bongiovanni, setting forth the procedures to be followed for the hearing before the Board envisioned by University Regulation 3.99a. Mr. Goldberg, on behalf of Professor San Filippo, was afforded the opportunity to submit both written and oral argument to the Board, to which Mr. Peirano, on behalf of the President, would be given the opportunity to respond. After an exchange of letters, a hearing date of March 11, 1988 was set by the Board. Regulation 3.99a sets out the role of the Board in the proceedings:

> The report of the panel shall be presented to the Board of Governors and a copy thereof sent to the respondent. Written as well as oral argument may be submitted to the Board on behalf of the President and the respondent. If further evidence is required by the Board, the panel shall be reconvened to receive it and to take any further findings that may be appropriate. The Board shall accord great weight to the findings of the panel, and its final action affirming, revising, or modifying the panel shall be by vote for such action by at least six members of the Board.

Under procedures set by the Board of Governors, written argument was received from Mr. Goldberg and a response thereto from Mr. Peirano prior to the hearing date of March 11, 1988. On March 1, 1988, a "statement of concern" on behalf of the Executive Council of the Rutgers Council of the American Association of University Professors Chapters ("Rutgers AAUP") was delivered to Jean Sidar, with a cover letter from Judy Green, President-elect of the Rutgers AAUP, to the Board dated February 29, 1988. Copies of the letter and brief were sent to the Members of the Board by the Rutgers AAUP. Even though the Rutgers AAUP had not asked for permission to distribute this brief to the members of the Board, and had no official role in this matter under University Regulations, the Board decided to accept the Rutgers AAUP's written "statement of concern" as an "amicus brief" but turned down the Rutgers AAUP's specific request to make an oral statement at the hearing. It was decided that Regulation 3.99a did not envision more than one spokesperson for each side and that the Rutgers AAUP's written "statement of concern" about the proceedings had very clearly set forth its position and made oral elaboration thereon unnecessary.

On March 11, 1988, the hearing envisioned by University Regulation 3.99a was held in open session (as requested by Professor San Filippo) before seven members of the Board: Adrienne S. Anderson, Michael Bongiovanni, Floyd H. Bragg, Anthony S. Cicatiello, Donald M. Dickerson, Norman Reitman, and Walter Wechsler. Mr. Goldberg, on behalf of Professor San Filippo, and Mr. Peirano, on behalf of the President, presented their oral arguments to the Board.

At the conclusion of the hearing, the Board conducted its deliberations in closed session, pursuant to N.J.S.A. 10:4-12b(9), and has reached the following conclusions and decision, in accordance with University Regulation 3.99a.

II. *Review of the University Senate Panel's Findings*

Under the governing University Regulation 3.99a, the Board was instructed to "accord great weight to the findings

of the [Senate] panel," but still understood that it had the ultimate responsibility to take final action on the matter by "affirming, revising, or modifying" the Panel's recommendations. With these mandates in mind, a major role of the Board was to determine whether or not the evidence on which the Senate Panel based its findings was sufficient to sustain those findings. The Board has fully recognized that the Panel members, as academic peers of Professor San Filippo, stood in a unique position to judge his actions in accord with his adherence to or violation of professional standards or expectations of behavior. In addition, the Board has recognized that under University Regulations, the Senate Panel was charged with the responsibility of hearing the witnesses and being the fact finder in this matter and more specifically being the judge of credibility and of conflicts in testimony. In turn, a major role of the Board was to determine the sufficiency of the evidence considered by the Panel in making its findings and to determine whether the Panel properly discharged its responsibilities under the governing University Regulations. Each charge by the President has been separately reviewed with this standard in mind:

Charge 1a

> Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to those individuals, as set forth more fully in the attached documents, is as follows:
>
> a. You took advantage of your professorial position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

The Panel sustained this charge. Both visiting scholars testified before the Panel and were subject to extensive cross-examination by Professor San Filippo's attorney. Mr. Gao testified on four separate days, with a total of 141 transcript pages of direct testimony, and 154 transcript pages of cross-examination. Mr. Xiao also testified before the Panel on four separate days, with a total of 126 transcript pages of direct testimony and 250 transcript pages of cross-examination. Professor San Filippo spent a total of parts or all of 20 days on the witness stand, 13 days of direct examination and ten days of cross-examination (3 days involved both direct and cross-examination) a total of 1052 transcript pages of direct testimony was given by Professor San Filippo, and 919 pages of cross-examination, much of it concerned with Charge 1a.

After listening to that massive amount of testimony and judging for itself the credibility of the witnesses, the Senate Panel concluded that the charge was true. The Panel found that the evidence established the fact that Mr. Gao did uncompensated outside work on Professor San Filippo's property on at least three weekends in late spring and early summer 1985. They also found that Mr. Xiao did outside work on Professor San Filippo's house on July 4, 1985 and that while cleaning and washing windows, he fell off a ladder and injured his back.

Professor San Filippo did not deny that Mr. Xiao and Mr. Gao were on his property and did domestic and outside work on those days, but he maintained that the occasions were social visits and that any work done was incidental to the essential social nature of the occasion. He also maintained that he worked alongside Mr. Xiao and Mr. Gao in whatever tasks were done on those dates, an assertion which was disputed by the testimony of the visiting scholars.

The Panel concluded from the description given by the two Chinese visiting scholars that they "had little choice in their response" to Peng Zhou's invitation to come to Professor San Filippo's home on the days in question. In the Senate Panel's opinion, the evidence demonstrated that "Professor San

Filippo took advantage of his professional position and exploited these visiting scholars in a manner that was demeaning and insensitive." Specifically, the Panel found that the testimony of the visiting scholars documented Professor San Filippo's "abrasive and threatening treatment" of them, because "he spoke to them in a threatening and abusive manner," letting "them know that if their work in the laboratory was not adequate, he would write their supervisors back in China."

After listening to the extensive testimony of Messrs. Gao and Xiao and Professor San Filippo and Peng Zhou on what occurred at Professor San Filippo's house on the weekends and holiday in question, the Panel rejected Professor San Filippo's characterization of these incidents as "social" occasions and concluded that Messrs. Gao and Xiao "had little choice in their response" to Peng Zhou's invitation to come to Professor San Filippo's house. The Panel thus sustained the charge that the visiting scholars were directed or led to believe that "they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985."

The Board's review of the evidence considered by the Senate Panel has led to the conclusion that there was ample evidence to support the Panel's sustaining of Charge 1a. The Panel Report recounts that on each of the days in question, Professor San Filippo picked them up to bring them to his house and drove them back to their apartment. He also provided lunch (or the cost of lunch when on one occasion he was feeling ill and was unable to accompany them to lunch). Once at Professor San Filippo's house, Mr. Gao recounted such activities as "digging, removing soil, pulling out vines, fertilizing, planting ground cover, and moving cement slabs, activities which involved a significant amount of work and time." Mr. Xiao reported working on July 4, 1985 "cleaning and washing windows and the front porch. He was injured when he fell off a ladder while doing the cleaning work."

"Neither Mr. Gao nor Mr. Xiao was offered or paid any compensation for their work." (Senate Panel Report, p. 6-8.)

The extensive testimony of Messrs. Gao and Xiao supports the conclusions reached by the Panel. Mr. Gao testified (10:11)[5] that he was picked up by car by Professor San Filippo at about 8:30 a.m. and was returned to his apartment at about 5:00 p.m. Mr. Gao stated that when he arrived at Professor San Filippo's house he did not first go into the house. Instead, Gao testified "Right after we arrived Professor San Filippo told us to go to the garage. Each one picked up a shovel because we were supposed to plant some trees." (10:12). When asked if Professor San Filippo helped him in turning the soil to plant the tree, Gao replied in the negative (10:25). Gao stated that he was inside San Filippo's house on only one occasion, to get some water to drink (10:27). Gao further stated that San Filippo "told us to lift and remove [a] cement block." (10:40). On reporting on a third visit to San Filippo's house, with Peng Zhou and Weimin Shi, Gao stated "I didn't want to go, but I had to go." [Q: Why did you feel that you had to go?] "Because while I was working in the professor's lab he frequently gave me trouble and threatened me by saying that he will write to my professor in China and he will send me back." (10:56). On that third occasion, Gao stated "The professor wanted us to move some of the flowers that were in here to over here." (10:56).

Changhe Xiao, the visiting scholar who was injured at Professor San Filippo's house on July 4, 1985, testified that on July 3, 1985, "Peng Zhou told me July 4th, the next day, was a holiday and in Dr. Filippo's house there are some chores we are supposed to go to help do those chores." (6:41). When asked if he told Peng Zhou that he did not want to go to Professor San Filippo's house to do housework, Xiao replied that he did not because "I think I have to do—I thought I had to do because if this Professor wants students to do something

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[5] References to the transcript of the Senate Panel Hearings refer to Volume and Page Number. (Here, Volume 10, Page 11).

I have to follow the instruction." (6:44). He further testified that Professor San Filippo picked him up by car at his apartment at 8:30 a.m. and drove him, Hetian Gao, and Peng Zhou to his house. Xiao reported on what occurred upon arrival at the house:

> We got out of his car, went to his backyard, then he followed us—I mean San Filippo followed us. Then he took out a piece of paper from his pocket and, "Mr. Xiao, you clean this." He led me to the front of the house. He said, "Clean the door and the windows," and finally he pointed to, "Clean the porch." He gave me two ladders; one is a little shorter ladder, wooden ladder, double piece wooden ladder. (6:46-47).

The Panel explicitly considered and rejected the following responses of Professor San Filippo to this charge (Senate Panel Report, p. 9):

> (1) he never knew Mr. Gao or Mr. Xiao were coming on these occasions [37:36]; (2) the amount of work involved was insignificant; (3) there was no evidence that he led them to believe that they had no choice; (4) the University investigation of these charges was faulty; (5) there are inconsistencies in the description of the activities at his house; (6) other faculty members have students do uncompensated work for them; (7) there is no evidence that Mr. Gao complained to any of the other Chinese visitors at his house; (8) Professor San Filippo integrated his professional and social life, and any work done was done in a social context; (9) other Chinese scholars who had just arrived in the United States also visited his house; (10) Mr. Gao and Mr. Xiao came to a barbecue in October, 1985, at his house; and (11) these complaints were generated because he purportedly was asked by these individuals in August, 1985, for his support in applying to graduate school, support which he would not give at that time. (Senate Panel Report, p. 9.)

The Board has concluded that based on the evidence presented to the Panel, there was sufficient evidence for the Panel to find that Charge 1a was true, and thus the Board sustains the Panel's finding on this charge.

Charge 1b

> You attempted to exploit Ms. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for you.

The Senate Panel found this charge to be "unproven" due to lack of evidence. Professor Zang did not testify and the only evidence consisted of the reports of others "concerning statements that Professor Yaru Zang allegedly had made." The Board concurs with the Panel's conclusion that this charge is unproven.

Charge 1c

> You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage to either Mr. Gao or Mr. Xiao.

The Panel Report found that it was "undisputed" that Professor San Filippo informed Professor Boikess that he planned to provide health benefits to Messrs. Gao and Xiao (U-11; 4:13). According to Professor San Filippo's own testimony, he "seem[ed] to remember telling Boikess that I intend to provide health benefits to them as post-docs, meaning health benefits from my grant, payment through my grant." (37:33).

The Panel Report went on to conclude that there was no evidence presented to indicate that Professor San Filippo ever communicated this representation to Hetian Gao. In the case of Changhe Xiao, a letter dated January 16, 1985 (U-25) from

Professor San Filippo to Professor Lin Shao-Fan was cited as making "a clear representation that he [Professor San Filippo] planned to provide medical insurance for Mr. Xiao" (Senate Report, p. 14). Mr. Xiao (6:16) stated that he had seen the letter in China and had therefore assumed that he would have such coverage.

The Senate Panel reported Professor San Filippo's testimony that he had told Mr. Xiao on June 6 or June 10, 1985 that he could not keep the condition of the letter because of developments in the department [31:62], and therefore told Mr. Xiao to get an application for health insurance at the International Center [31:60] (Senate Panel Report, p. 14). Mr. Xiao's testimony directly contradicted Professor San Filippo's, in that he, Mr. Xiao, testified that before he got hurt (July 4, 1985), Professor San Filippo never mentioned anything to him about health insurance and he assumed he was covered based on Professor San Filippo's prior representations [9:89]. The Panel believed Mr. Xiao and stated that "it had serious doubts about whether any conversation on this topic took place in June 1985" (Senate Panel Report, p. 15). The Panel considered and rejected the following responses of Professor San Filippo to the charge:

> (1) that Professor Boikess prevented Messrs. Gao and Xiao from receiving health insurance when he changed their title from Visiting Scholar to Visiting Investigator; (2) that Messrs. Gao and Xiao by arriving late made themselves ineligible for health insurance; (3) that he believed Mr. Gao would automatically receive health benefits when he appointed him on April 25, 1985; (4) that he did not appoint them for a year even though they arrived late because (a) their projects would take less than a year, and (b) Professor San Filippo was uncertain of their abilities.

The Panel sustained Charge 1c in regard to Mr. Xiao, but not in regard to Mr. Gao. The Board finds that the conclusions reached by the Senate Panel regarding Charge 1c were sup-

ported by sufficient evidence presented to it, and therefore sustains the Panel's finding on this charge.

Charge 1d

> During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

The Panel sustained this charge, citing, among other instances, the testimony by Mr. Xiao [6:76] that Professor San Filippo threatened to send him back to China after Mr. Xiao asked to go to a hospital for treatment of the back injury sustained at San Filippo's house. Mr. Xiao's testimony of the visit of Professor San Filippo to his dormitory room is supportive of this charge:

> I remember San Filippo was the first one, he opened the door. I was lying on the floor because of my back pain. I was lying on the floor. He entered my bedroom just beside the door with his hands on hips, "How's your back?" I was on the floor. Then I said, "Today my back is worse than yesterday." Then he said, "I can't take you to the hospital. How about a plane ticket this Sunday or sometime so you go back home, go back to China." Then he went away [6:76].

The Panel cited several other instances of testimony by the visiting scholars [Xiao: 11:9, 6:89; Gao: 11:9, 11:11, 9:111, 10:10], all demonstrating that Professor San Filippo acted in a threatening and harassing manner toward them. The Panel stated that it found this testimony "credible" (Senate Panel Report, p. 19). The Panel went on to cite eight more instances of testimony and four exhibits demonstrating repeated instances of loss of temper and "incidents of yelling, cursing, calling individuals stupid and using phrases like "send you back to China" (Senate Panel Report, p. 19).

The Senate Panel considered and rejected Professor San Filippo's responses to the charges, which included questioning the credibility of the witnesses, denial of the threats to send anyone back to China (21:69, 24:7) and stating that the work performance and actions of Messrs. Gao and Xiao were unsatisfactory.

The Board has found that the evidence presented to the Senate Panel was sufficient to sustain this charge. The Panel, mandated to judge the credibility of witnesses that appeared before it, resolved factual disputes and made findings which were amply supported by testimony in the record. Therefore, the Board sustains the Panel's finding on this charge.

Charge 1e

> On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

The Senate Panel sustained this charge after hearing testimony from Ms. Chen (13:36ff), and from two students, Michael Ayotte (13:15ff) and Dorothy Przydzial (13:15ff) who were in Ms. Chen's laboratory section on the day of the incident, and from Iona Beck, (13:21ff), a head stock clerk in the Chemistry Department, who was working next door to Ms. Chen's laboratory on the day in question. The students reported yelling and cursing which was clearly audible to them (13:8,16). Mrs. Beck reported that after the incident, which Mrs. Beck overheard, Ms. Chen came into her stockroom and cried. Mrs. Beck later reported the incident to Mrs. Gravin, coordinator of Chemistry 117, and then to Professor Martha Cotter (13:27).

Ms. Chen's own testimony (13:36ff) reported that Professor San Filippo became angered with her after she had failed to secure a position as Teaching Assistant and had been put on

the waiting list. She recounted that he had called her "stupid" and had indicated that she might "have to leave to go back [to] China" (13:41). She expressed her embarrassment at having her students overhear the incident because she thus "lost face to my students." After the incident she went into the stockroom to regain her composure and then returned to her class, but told her students to ask questions of another Teaching Assistant since she was still extremely upset.

The Senate Panel Report considered and rejected Professor San Filippo's explanation that he was frustrated about Ms. Chen's "naivete" and considered the potential loss of her teaching assistantship to be "another attack on his research group." The Panel found Professor San Filippo's treatment of Ms. Chen "and the disruption of the learning environment" to be "unprofessional, threatening, and abusive."

The Board has found that the Senate Panel had sufficient evidence on which to base its finding and has therefore sustained the charge. The Panel based its finding on several eyewitness accounts and, as faculty members themselves, could assess the behavior reported against the standards of the profession in such an instance Therefore, the Board sustains the Panel's findings on this charge.

Charge 2

> On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

The Senate Panel found that "the evidence clearly shows that Professor San Filippo allowed Mr. Xiao to use Mr. Zhou's medical insurance card on July 8, 1985." (Senate Panel Report, p. 22). The Panel also found it "irrelevant" whether Professor San Filippo "directed" the deception or whether Peng Zhou told Mr. Xiao to do it after Mr. Zhou conferred with Professor San Filippo.

Mr. Xiao testified (6:80) that Peng Zhou told him: "You have no insurance card. San Filippo wants you to use my insurance card." Then San Filippo said, "You go to the hospital [-] do not say any English. Your English is no good. Let Peng Zhou translate to you." Mr. Xiao also testified that San Filippo said, "Sign Peng Zhou," (6:81) when a nurse asked him to sign in at the emergency room. A band with Peng Zhou's name was put on his wrist.

Professor San Filippo stated that Peng Zhou had suggested the deception (27:40) and that he "wasn't too hot about that idea, but I agreed with the proviso that—to get him the treatment we could do this provided when the bill came, I got the bill and I would pay it." (27:40) The Panel rejected this explanation as "unacceptable," noting that Professor San Filippo paid the bill nine months after the July 8, 1985 hospital visit after it had been turned over to a collection agency.

This Board concludes that the Senate Panel had sufficient evidence on which to make a finding on this charge and therefore sustains the Senate Panel's finding on Charge 2.

Charge 3a

> 3. You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:
>
> > a. On or about August 1985, Ms. Abbie Lieber, a secretary who works solely under your supervision submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had not performed any extra

> work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

The Panel did not sustain this charge, noting that it did not find "either [that] (1) Professor San Filippo did not assign any extra work for this money, or (2) that Professor San Filippo did assign extra work, but it was not completed by Mr. Gao and/or Mr. Xiao," (Senate Panel Report, p. 24). The Board concurs in the Senate Panel's determination not to sustain Charge 3a.

Charge 3b

> Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

The Panel found sufficient evidence to sustain this charge. Mrs. Brownawell testified (43:106-107) that Professor San Filippo knew she was taking that week off and also that she would be getting paid for that week. Professor San Filippo maintained that prior to being classified as a Type 4 employee in August 1984, Mrs. Brownawell had accumulated over 700 hours of uncompensated time as a consultant based on a 35 hour work week and that he had understood from Jack Gordon, the departmental administrator of the Chemistry Department, that he "could continue to operate the way [he] had until he found out otherwise," (24:157-8). [Mr. Gordon was unavailable to testify due to medical reasons.]

The Panel considered and rejected Professor San Filippo's response to the charge as "unacceptable," and further noted that his prior practices of employing Mrs. Brownawell as a

consultant permitted "hundreds of hours of uncompensated hours to remain outstanding." The Panel noted that it was to Professor San Filippo's advantage to have Mrs. Brownawell classified as a "consultant" since there was no fringe benefit charge to his grant in that case, whereas there would have been a 25% charge to the grant if Mrs. Brownawell had been classified as an employee. The Panel thus found Professor San Filippo's explanation unacceptable in part because it did not approve of the original consultant arrangement.

The Board notes that the charge before the Senate Panel was limited to the validity of the time report for the week of August 17, 1984. The Board sustains the Panel's finding on this charge since it remains undisputed by both Mrs. Brownawell and Professor San Filippo, but the Board also rules that the issue of whether Mrs. Brownawell was incorrectly titled as a consultant was not at issue before the Panel, and is therefore irrelevant to the finding on this charge.

Charge 3c

> Ms. Brownawell was inappropriately paid for the week ending November 9, 1984.

This charge was not included in President Bloustein's October 1, 1986 letter to Professor San Filippo. Professor San Filippo's attorney first objected to its introduction by the Senate Panel and then withdrew his objection.

The Panel did not sustain this charge, essentially finding that Mrs. Brownawell was attending a work-related course in California during that week and was therefore entitled to full compensation.

The Board concurs with the Panel in not sustaining this charge, and would not have sustained it even if evidence sufficient to support it had been brought before the Panel because of the procedural irregularity which the addition of this charge by the Panel represents. University Regulations 3.98 and 3.99 do not envision new charges being introduced

by the Panel, apart from those originally brought by the President[6].

Charge 4

> You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows Chinese scholars who you knew did not have appropriate credentials and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.

The Senate Panel sustained this charge in reference to Mr. Peng Zhou, and did not sustain it in regard to Mr. Cong-Yuan Guo.

The Senate Panel Report cited the testimony of Professor Robert Boikess, Chairman of the Chemistry Department, that a "postdoctoral fellow is normally someone who has a Ph.D. In rare instances, it is someone who has the seniority, the experience, the experience in doing research. That's essen-

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[6] University Regulation 3.97 and due process require that "the President shall send the faculty member a notice stating in detail *the charges* against him," (emphasis added) so that, consistent with due process the faculty member may have adequate notice of the charges made against him. Regulation 3.98 states that "The President of the University shall designate a lawyer or a member of the faculty to present *the charges*. . ." (emphasis added) and University Regulation 3.99 states that "The panel shall determine whether *the charges*, or any part thereof, are true . . . ." It is this Board's opinion that the term "the charges" in the Regulations referenced above refer inclusively to those charges which the President made in his letter of October 1, 1986 to Professor San Filippo, and that the Senate Panel should not have added this charge during the Panel hearing. However, since the charge was not sustained by the Panel, the Board has determined that it did not contribute to the ultimate recommendation made by the Panel and thus this irregularity had no adverse impact on the overall Panel findings and recommendation.

tially associated with the process that we normally give a Ph.D. for, somebody who is a relatively quite senior person,"(4:20).

Professor San Filippo had Mr. Cong-Yuan Guo appointed as a Postdoctoral Fellow in 1982 (U-104). Mr. Guo had studied at Nankai University for four years and subsequently worked as a research associate. The Panel noted that in 1981 Professor San Filippo had sponsored three Chinese scholars as postdoctoral fellows and that these individuals "quite plausibly fit Professor Boikess's definition of exceptions to the postdoctoral title," Senate Panel Report, p. 32. Given the close proximity in time of Mr. Guo's appointment to the 1981 postdoctoral appointments, and "the absence of clear guidelines as to exceptions to the definition of postdoctoral fellow in cases without a Ph.D.," Senate Panel Report, p. 33, the Board finds that the Panel had sufficient evidence to reach its decision not to sustain this charge in regard to Mr. Guo.

However, the Panel did sustain the charge in regard to Peng Zhou. The Panel noted that Mr. Zhou's appointment as Postdoctoral Fellow on August 8, 1984 [U-53] came about after a memorandum dated July 17, 1984 from Nathaniel J. Pallone, Vice President for Academic Affairs, was sent to "selected members of the University Community including Principal Investigators." The Panel determined that Professor San Filippo had knowledge of that memorandum prior to assigning a title to Mr Zhou. Page 4 of that memorandum defined postdoctoral research fellows "as a category of students who have very recently received their doctorate, . . . Persons who do not fit this description should either be terminated or should be moved to the status of employees. . ." (Senate Panel Report, p. 34).

The Panel determined that, aside from the issue of the Pallone memorandum, Professor San Filippo acted improperly in regard to selecting a title for Mr. Zhou. The report cites the financial advantage to Professor San Filippo's grant in the use of the title of postdoctoral fellow, rather than that of employee, since the employee title would have carried with

it a 25% charge to Professor San Filippo's grant for fringe benefits, whereas the postdoctoral fellow title involved no such charge. The Panel also determined that the fact Mr. Zhou had only a B.S. degree in Chemistry and several years of experience demonstrated that there was no justification for use of the title "Postdoctoral Fellow" in Mr. Zhou's case.

The Board concludes that the evidence considered by the Panel was sufficient to sustain its finding on this charge in regard to Mr. Zhou and therefore the Board sustains the Panel's finding. The Board notes that Professor San Filippo later supported Mr. Zhou's application for the doctoral program in chemistry, "a fact which clearly established that [he] did not have the credentials to be [appointed as a] post-doctoral fellow." (wording of Charge 4).

Charge 5

> During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, on of the individuals referred to in #4. above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of the fact and did not make it known when you submitted the letter.

The Senate Panel sustained this charge. According to Professor San Filippo's own testimony (37:48ff), the letter on behalf of Mr. Zhou was typed in his office after he had "smoothed" the English translation which Mr. Zhou had provided of the original letter. Professor San Filippo then had Mr. Zhou sign the letter "Liu Guozhi" in Chinese characters. The letter was put on the stationery of Jilin University, which Professor San Filippo had obtained on a trip to China (37:49). Professor San Filippo reported that he had received the original of the letter from Professor Liu Guozhi while he was on a visit to China, and was told "Please give this letter to Zhou Peng," (37:50).

Mr. Zhou's testimony about the letter (45:33ff) mirrored Professor San Filippo's account. Mr. Zhou reported that he translated the letter (45:35) and signed Liu Guozhi's name in Chinese characters (45:33). Both Professor San Filippo and Peng Zhou reported seeing the original, but neither could account for the present whereabouts of the original Chinese version.

The Panel concluded that it found "insufficient evidence to sustain a charge that there was no original letter of recommendation from Professor Liu Guozhi," (Senate Panel Report, p 39). However, it sustained Charge 5 on the basis of the undisputed facts surrounded the submission of the letter to the Chemistry Department, namely, that it was submitted:

> (a) without attaching the original in Chinese; (b) without indicating that the letter was a translation; (c) without indicating that the translation was done by Mr. Zhou, the student for whom the letter of recommendation was written; (d) without indicating that the Chinese signature on the submitted letter was not written by Professor Liu Guozhi, but was instead written by Mr. Zhou; and (e) without indicating that Professor San Filippo had "smoothed" the English. (Senate Panel Report, p. 38-9).

The Board sustains the Panel's findings on this charge and finds that the evidence supports the finding that the English translation of the letter, which was the only version submitted, was not prepared or signed by Liu Guozhi, but rather by Peng Zhou, the subject of the letter of recommendation, with assistance in "smoothing" the English by Professor San Filippo. The evidence considered by the Panel concerning the circumstances surrounding the submission of the letter supports the substance of this charge, even if an original of the letter did exist, as was claimed by Professor San Filippo and Peng Zhou in their testimony before the Panel.

Charge 6

> On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite the specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in your laboratory.

The Panel sustained this charge. According to Professor San Filippo's own testimony (21:69), the facts alleged in this charge were true:

> *Direct Examination of Professor San Filippo*
>
> Q: . . . Is charge six true?
>
> A: Substantially yes. (21:69)

The Panel also cited the existence of time report forms submitted by the three Chinese students for payment for the work done in January 1986, after the December 16, 1985 issuance of Professor Boikess's memorandum.

The Panel went on to judge the reasonableness of the Boikess prohibition given Professor San Filippo's allegations that the memorandum was unconstitutional, in violation of the principles of due process and academic freedom, and sections of the Rutgers AAUP Bargaining Agreement (21:72). The Panel noted that Professor Boikess issued the memorandum because of serious allegations of abusive and threatening behavior by Professor San Filippo toward the Chinese research workers. The Panel also noted that Professor Boikess had consulted with his colleagues on the Chemistry Department's Policy and Planning Committee before issuing the memorandum.

The Board sustains the Panel's findings on this charge and has determined that the Senate Panel had considered sufficient evidence on which to base its finding for this charge.

III. *Review of Proceedings In Light of Due Process Requirements*

Before proceeding to consider whether the above sustained charges constitute a dismissible offense or offenses, the Board must next determine whether the proceedings have been conducted in full accordance with the required due process.

Notice and opportunity for a hearing are the basic due process requirements for a detenuring proceeding at a state university. Under *Morrissey v. Brewer*, 408 U S 471, 481 (1972), "due process is flexible and calls for such procedural protections as the particular situation demands," i.e., "once it is determined that due process applies, the question remains what process is due." The conclusion reached by W.A. Kaplin in *The Law of Higher Education*, 2d ed. (1985) at 174, is that "the crux of these [due process] safeguards is notice and opportunity for a hearing. In other words, the institution must notify the faculty member of the reasons for the decision and provide a fair opportunity for him to challenge these reasons in a hearing before an impartial body." A review of existing case law in the area confirms Kaplin's view and indicates that the due process protections afforded a faculty member under the procedures outlined in University regulations and followed in the present case clearly fulfill such requirements.

While court cases involving detenuring proceedings are not common, generally courts have allowed university proceedings a wide latitude in how they meet due process requirements. In the Third Circuit, a 1985 opinion, *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985), found no due process violations in a proceeding at a state university in which the faculty member charged he had been given inadequate notice, evidence was not disclosed in a timely fashion, the President was not present as required by the University's By-Laws, the panel was not neutral and detached, and that the defendant

was not effectively heard and could not effectively cross-examine witnesses. Significantly, in dismissing these claims of denial of due process by the faculty member, the court stated that:

> The administration of the internal affairs of a college and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration . . . . *Due process should not be employed to insure that the exercise of discretion is 'wise' but only that it is not unreasonable, arbitrary or capricious*, *Johnson v. Lincoln University*, 776 F.2d 443, 455 (3d Cir. 1985), citing *Chung v. Park*, 514 F.2d 382, 387 (3d Cir. 1975). (Emphasis added.)

In *Johnson*, a tenured faculty member was terminated from a state university after presentation of charges to the University's Judicial Committee, consisting of three faculty members elected by the faculty and one appointed by the President. The committee recommended termination of tenure, a recommendation which was put into effect by the President. The faculty member then appealed to the University's Board of Trustees, which upheld the original termination.

The earlier Third Circuit case, *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975), also concerned the review of termination proceedings against a state college professor. In reviewing the faculty member's due process claims, the Court cited *Morrissey v. Brewer's* listing of "minimum procedural safeguards [which, in *Morrissey*, were designed for parole revocation hearings] which are adapted to the particular characteristics of the interests involved and the limited nature of the controversy." *Chung* went on to state that "these safeguards *may* include:

(1) written notice of the grounds for termination;

(2) disclosure of the evidence supporting termination;

(3) the right to confront and cross-examine adverse witnesses;

(4) an opportunity to be heard in person and to present witnesses and documentary evidence;

(5) a neutral and detached hearing body; and

(6) a written statement by the fact finders as to the evidence relied upon." (*Chung*, at 386, emphasis added.)

It is clear that the present case of Professor San Filippo more than amply met these safeguards, even though the *Morrissey* checklist was designed with the stricter standards of parole revocation hearings in mind, not University detenuring proceedings. In Dr. Chung's case, however, the hearing was held *after* the decision to terminate had been made but before the termination of benefits. At the hearing, the burden of proof was put on Dr. Chung to show that the decision of the administration to terminate was arbitrary, capricious or discriminatory. Even then, however, the Third Circuit found this procedure to be in accord with due process. The count seemed to place great weight on internal academic procedures and judicial noninterference with same:

> Due process does not impose such strictures [requiring a pre-termination hearing with the burden of proof on the state college] on professorial pre-termination hearings. Unlike some legal rules, due process is protean in nature. The determination of what process is due depends on appropriate accommodation of the competing interests involved . . . . Thus, we must here weigh the professor's interest in avoiding an unreasonable termination against the college's interest in having an efficient process for identifying and ridding itself of incompetent faculty members. In accommodating these interests we are cognizant of the Supreme Court's admonition that: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and

> restraint . . . By and large public education in our Nation is committed to the control of State and local authorities" (*citing Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). (*Chung v. Park*, 514 F.2d 382, 386 (3d Cir. 1975)).

Although *Chung* enumerated the six *Morrissey* requirements (which in *Morrissey* apply to parole revocation hearings only), the opinion then goes on to distinguish *Morrissey* by stating that "a different type of interest and a different type of decision making" is involved in *Chung*. The Court stated that:

> . . . we are concerned [in *Chung*] with an exercise of discretion by the college administration as to whether Dr. Chung was competent to perform the duties of a professor. By its nature, this type of decision cannot be adjudged as correct or erroneous, but only as reasonable or unreasonable. Moreover, Dr. Chung's property interest here would not seem to be of the same critical magnitude as the liberty involved in *Morrissey* [parole revocation] or the sole available means of subsistence involved in *Goldberg* [*v. Kelly*, 297 U S 254 (1970)]. The differences in the nature of the interests implicated affect the procedural requisites for the hearing. (*Chung v. Park*, 514 F. 2d 382, 387 (3d Cir 1975)).

The *Chung* court concluded that if the procedure employed by the college "is adequate to prevent unreasonable, arbitrary or capricious termination decisions, it satisfies due process." It went on to state that "Chung was fully informed of the grounds for his termination prior to the hearing and had a full opportunity to prove to a neutral arbitration panel that the termination was unreasonable, arbitrary or capricious, but failed to do so," (*Chung*, at 387). The present case of Professor San Filippo exceeded these minimum requirements and met those of *Morrissey*, which the Third Circuit specifically stated were *not* applicable to a detenuring case.

The overall thrust of the Third Circuit cases, then, appears to be to uphold faculty termination proceedings if university procedures are followed and if those procedures afford appropriate due process protections. The facts of the San Filippo matter clearly demonstrate that University regulations as applied to these proceedings exceed the Third Circuit's minimum requirements for due process in such cases.

Other representative, recent detenuring cases around the country are in accord with the views of the Third Circuit. A 1986 Minnesota case, for example, *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8th Cir. 1986), cited four requirements of due process in such cases:

> (1) clear and actual notice of the reasons for termination in sufficient detail to enable him or her to prevent evidence relating to them;
>
> (2) notice of both the names of those who have made allegations against the teacher and the specific nature and factual basis for the charges;
>
> (3) a reasonable time and opportunity to present testimony in his or her own defense; and
>
> (4) a hearing before an impartial board or tribunal (*Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8th Cir 1986), citing *King v. University of Minnesota*, 774 F 2d 224, 227 (8th Cir. 1985).

In dismissing Agarwal's due process claim, the court found that he had received prior notice of the charges against him and was represented by counsel and had taken full advantage of his rights to present evidence and to call and cross-examine witnesses.

A 1984 Wisconsin case, *Patterson v. Board of Regents of the University of Wisconsin System*, 350 N.W. 2d 612, 119 Wis. 2d 570 (1984), stressed the importance of a pretermination hearing in a case in which a faculty member's nonappearance for work was treated as a resignation. The University had simply held the faculty member's nonap-

pearance to be the equivalent of a formal resignation and had not held a pretermination hearing. The court ordered the University to hold the hearing. The *Patterson* case cited Thomas Emerson's discussion of tenure and its relation to academic freedom in Emerson's seminal work, *The System of Freedom of Expression* 594-95 (1970):

> The chief device for assuring the faculty member freedom as a teacher, scholar and citizen is his right to tenure . . . . The institution of tenure is designed to guard the faculty member against dismissal for political or other inadmissible reasons, a fact often hard for him to prove, and to assure him economic security in which he can carry on his search for truth in his teaching and research. Other protective devices are embodied in the concept of 'academic due process.' *The principles of academic due process, still in the stage of growth, entitle the faculty member to certain procedural rights in dismissal or disciplinary proceedings, including a determination of the issues, at least in the first instance, by a tribunal of his peers.* T. Emerson, The System of Freedom of Expression 594-95 (1970), cited in *Patterson* at 620. (Emphasis added.)

The hearing accorded by the University Senate Panel in Professor San Filippo's case clearly met Professor Emerson's guidelines, and, as will be shown below, the due process protection afforded Professor San Filippo also exceeded the standards set for such dismissal proceedings by the national AAUP. (The Rutgers Council of AAUP Chapters is the duly recognized collective negotiation agent for faculty members at Rutgers.)

Turning now to the proceedings at hand, the Board review finds the procedures actually followed to be in accord with the due process requirements of notice and opportunity for a hearing. University Regulations 3.93-3.99a clearly provide for such notice, in that 3.97a requires that "the President shall send the faculty member a notice stating in detail the charges

against him." This was done through President Bloustein's October 1, 1986 letter to Professor San Filippo. The Senate Panel did add one charge, 3c, not originally contained in the President's October 1, 1986 letter, and the Board has already noted in this Opinion that the Senate Panel was not empowered under University Regulations to do this. In the Board's judgment, however, this error by the Senate Panel did not materially affect or alter the outcome of the proceeding, as all the sustained charges were those contained in President Bloustein's October 1, 1986 letter. Since the Panel did not sustain this improper charge (3c), it cannot be viewed as having contributed to the Panel's ultimate recommendation for dismissal.

Concerning the issue of Professor San Filippo's right to a hearing, the Board finds that a full and complete hearing of the case has occurred, conducted by an independent fact-finding panel of Professor San Filippo's academic peers. Each side was represented by counsel, had the right to question and cross-examine witnesses, and to submit evidence to the Panel. The hearings took 46 days and generated over 5,800 pages of transcript. The President's attorney rested his case after sixteen days of hearings. As noted previously in this Opinion, on July 28, 1987, the eighteenth day of the presentation of Professor San Filippo's case, the Panel announced its "concern for the length of time that the hearings were taking," (Senate Panel Report, p. 3). After requesting from both sides "a list of any additional witnesses that they planned to call with a brief description of what each witness would testify to, in sufficient detail so the Panel could decide whether or not this information was relevant and material," the Panel determined that nine more days of hearings would "provide both sides ample opportunity to conclude their evidentiary presentations." The Panel then allocated equal time to each side, timing that time with a chess clock. Professor San Filippo's attorney has protested the time limits set by the Panel.

The Board has determined that the Panel's action in setting such time limits did not result in the denial of due process to

Professor San Filippo. Upon examining the record, this Board has determined that Professor San Filippo's case occupied approximately 3,023 transcript pages, while the President's case occupied about 2,005 pages of the hearing transcript. Examination of the record indicates that ample opportunity was afforded Professor San Filippo to present his case during the Senate Panel hearings. For example, Professor San Filippo appeared in his own defense in direct testimony on 13 days, and on cross-examination for 10 days (with 3 days containing both direct testimony and cross-examination). After this review of the record, the Board has determined that Professor San Filippo has been accorded a full opportunity to defend himself against the charges and that no violation of due process occurred as a result of the reasonable time limits set by the Panel. If Professor San Filippo feels that he was not accorded sufficient opportunity to defend himself after a hearing which lasted 46 days, over half of which time was devoted to his own evidence, then the Board cannot find that the fault lies in any action taken by the Senate Panel, which, not unreasonably, could not let the proceedings continue indefinitely.

Professor San Filippo's attorney has also alleged that the charges brought against Professor San Filippo were fabrications based on a personal "vendetta" (oral argument of Ira M. Goldberg on behalf of Professor San Filippo, March 11, 1988 Hearing before the Board of Governors, Transcript, p. 16) against him by members of his Department. These charges of fabrications and a "vendetta" all present factual issues which involve, among other things, determinations of credibility (including motives for testifying) and relevance. As noted before, these determinations are the responsibility of the Senate Panel, and the Board finds that, contrary to Mr. Goldberg's assertions, the Senate Panel neither shirked its responsibility in this regard nor made findings which lacked the necessary factual predicates. In short, the Board concludes that the procedures accorded Professor San Filippo under University Regulations did result in a full and fair hearing of all

the charges by an impartial Senate hearing panel of his faculty peers, who were in the best position to resolve these factual contentions. The length and thoroughness of the Panel's review complemented by the Board's present review of the Panel's report and recommendations have provided Professor San Filippo with an unbiased, impartial hearing on all the charges.

Professor San Filippo's attorney, Ira M. Goldberg, has further argued that his defense was so impaired by the alleged failure of the University to meet its obligation under University Regulation 3.98 to pay his "reasonable expense" that it amounted to a violation of due process. The Board has inquired and has been informed that Mr. Goldberg has been paid considerable sums on account, and that the final settlement of his legal expenses will occur upon his submission of a detailed delineation of the hours and disbursements which he spent on the case. Under such circumstances, there is no violation of due process. The question of what sum constitutes such "reasonable expense" in this case, under University Regulation 3.98, is not an issue that is before this Board.

Professor San Filippo's attorney has protested the denial of travel funds from the University in order to bring to the Senate hearing panel Chinese nationals resident in China who would have allegedly appeared in Professor San Filippo's defense. On the charges involving exploitation of foreign students and scholars, Professor San Filippo presented five witnesses, Peng Zhou, Hong Bing Gu, Soon He Kim, Weimin Shi, and Cong Yuan Guo on his behalf, and had full powers of cross-examination of the Chinese nationals who testified on behalf of the President. It is the Board's judgment that Professor San Filippo's due process rights have not been adversely affected by the absence of further witnesses from China. In any case, Professor San Filippo could have brought in such witnesses from China at his own expense; the only point at issue was whether reimbursement of such travel expenses should have been covered by University Regulation 3.98's provision for University payment of the "reasonable expense" of the faculty member's counsel. Several Chinese

witnesses did testify to good treatment by Professor San Filippo, and even if several more were brought in, that would not have mitigated the effect of the testimony of the three individuals, Hetian Gao, Changhe Xiao, and Zong Ping Chen, who did complain of serious exploitative and abusive treatment by Professor San Filippo. Another issue concerning absent Chinese witnesses presented by Mr. Goldberg was the issue of the potential impact of additional Chinese witnesses on Professor San Filippo's receiving a fair hearing on Charge 5, which concerned the letter of reference submitted to the Chemistry Department by Professor San Filippo on behalf of Peng Zhou. According to Professor San Filippo and Peng Zhou, this letter was based on a Chinese original written by Professor Liu Guozhi, a Chinese national resident in China at the time of the hearing. In the Board's judgment, the absence of testimony by Professor Liu Guozhi was essentially immaterial to the Panel's determination on the charge, which was based on the lack of disclosure by Professor San Filippo to the Chemistry Department of the relevant circumstances surrounding the letter when it was submitted on behalf of Peng Zhou. Testimony by Professor Liu Guozhi would not have covered these circumstances, which constituted the essence of Charge 5.

Even though the standards set in the national AAUP's Statement on Procedural Standards in Faculty Dismissal Proceedings have not been explicitly adopted by Rutgers and therefore do not control here, it is still instructive to compare the due process protections afforded Professor San Filippo under the present proceedings against the standards set by the national AAUP in that statement. The following steps which are outlined in that document were all followed in the present proceeding:

1. Preliminary Proceedings Concerning the Fitness of a Faculty Member
2. Commencement of Formal Proceedings
3. Hearing Committee

4. Committee Proceeding
5. Consideration by Hearing Committee
6. Consideration by Governing Body

In its Statement on Procedural Standards in Faculty Dismissal Proceedings, the national AAUP first recommends that a personal conference be held between the faculty member and the appropriate administrative officer. This step was followed in the case of Professor San Filippo, when Dean Tilden G. Edelstein discussed the allegations with Professor San Filippo and his Rutgers AAUP advisor, Wells Keddie, on November 25, 1985. Between that meeting and the Commencement of Formal Proceedings, initiated by the October 1, 1986 letter from the President to Professor San Filippo, clearly setting forth the charges, the charges were put in writing at Professor San Filippo's request, and, in accordance with University Regulation 3.94, the Chemistry Department was consulted and made its recommendation, which was first conveyed to the Provost, then to the Executive Vice President and Chief Academic Officer, and finally, to the President. University regulations, therefore, incorporate *more* safeguards than are required under the national AAUP guidelines. (The Rutgers AAUP, however, has expressed its view in its "amicus" brief that these national AAUP standards have not been properly followed in the present case.)

In the Board's view, the Senate Panel hearing was conducted in full accord with the national AAUP guidelines for consideration by a hearing committee of impartial academic peers. Professor San Filippo not only had the option of assistance by counsel, but under University Regulation 3.98, his "reasonable expense" will be borne by the University. Professor San Filippo's counsel had the opportunity to challenge membership on the Panel, and the final composition of the Senate Panel was consented to by counsel for both sides.

In discussing the "Consideration by [the] Governing Body," the national AAUP guidelines state:

> On the assumption that the governing board has accepted the principle of the faculty hearing committee, *acceptance of the committee's decision would normally be expected.* (Emphasis added.)

University Regulation 3.99a provides that "the Board shall *accord great weight* to the findings of the panel," a provision which gives far more way for independent review by the governing board than do the national AAUP guidelines, which state, "acceptance of the committee's decision would *normally be expected,*" (emphasis added). Furthermore, the national AAUP guidelines state that "*If* the governing body chooses to review the case, its review should be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both by the principals at the hearing or their representatives," (emphasis added). University Regulation 3.99a makes review by the Board of Governors mandatory if action is to be taken, and explicit provision is made for the submission of written as well as oral argument.

In conclusion, therefore, not only did the procedures followed in this case accord fully with the requirements of due process, but these procedures actually exceeded those recommended by the national AAUP in such cases, affording greater protection to Professor San Filippo than would the national AAUP's own Statement on Procedural Standards in Faculty Dismissal Proceedings. The Board concludes, therefore, that the procedures followed in Professor San Filippo's case clearly exceeded the requirements of due process in such cases, and therefore the Board shall now proceed to determine what final action should be taken in this matter.

IV. *Final Action*

University Regulation 3.99a instructs the Board to "accord great weight to the findings of the panel" and to take "final action" "by vote for such action by at least six members of the board" "*affirming, revising, or modifying the panel,*" (emphasis added).

Before arriving at its final recommendation, the Senate Panel took into account its finding that Professor San Filippo

had compiled an "excellent record" (Senate Panel Report, p. 43) as a researcher, thereby following University Regulation 3.99, which instructed the Panel to take into consideration "the respondent's previous record and his value to the University." The Panel, however, found that even after taking these factors into account, its findings, based on the evidence presented at the hearings, indicated:

> . . . that Professor San Filippo has exploited, threatened and been abusive of individuals who have worked under him in a professional capacity. In addition, we find that Professor San Filippo has demonstrated a serious lack of integrity in his professional dealings. His excellent research record and his contribution to the University are laudatory, and were considered by the Panel in reaching its decision the Panel unanimously recommends, however, that Professor San Filippo be dismissed from the University. (Senate Panel Report, p 43.)

After careful consideration of all of the relevant factors, review of the sufficiency of the evidentiary basis for the Senate Panel's findings and of the proceeding's adherence to the standards of due process, consideration of Professor San Filippo's past record, and after "accord[ing] great weight to the findings of the panel," the Board has concluded that Professor San Filippo should be dismissed from the University.

According to President Bloustein's October 1, 1986 letter to Professor San Filippo, the charges made "evidence a failure to maintain standards of sound scholarship and competent teaching," and thereby meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99. University Regulation 3.91, which adopts the Statement on Professional Ethics adopted by the national AAUP in 1966, sets out in as much detail as can be encompassed in a general statement what classes of behaviors define the standards of sound scholarship and competent teaching[7]:

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[7] The complete text of University Regulation 3.91 is set forth in Appendix C.

3.91. Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, every member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto. In expressing those ideas which seem to him justified by the facts, *he is expected to maintain standards of sound scholarship and competent teaching*. He shall conduct himself in accordance with the standards of professional ethics set forth in Paragraphs I to V, inclusive of the Statement on Professional Ethics adopted by the American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics . . . .

"II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. *He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit.* He respects the confidential nature of the relationship between Professor and student. *He avoids any exploitation of students for his private advantage* and acknowledges significant assistance from them. He protects their academic freedom. . . ." (Emphasis added.)

Those sustained charges against Professor San Filippo, which, in the Board's judgment, are the most serious, namely: 1a, 1d, and 1e, directly fall under the prohibition of Paragraph II of the national AAUP's Statement on Professional Ethics, in that the behavior stated in these sustained charges demonstrate clear "exploitation of students for his private advantage," and lack of proper "respect for the student as an

individual," and thereby meet the standards for a dismissible offense under University regulations.

Sustained Charge 1a concerned the exploitation of Mr. Hetian Gao and Mr. Changhe Xiao, "by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985." As visiting scholars from the People's Republic of China, Messrs. Gao and Xiao came to tho United States for further training and study and relied upon Professor San Filippo to be their "intellectual guide and counselor," but instead were subjected to "exploitation" "for his private advantage." Sustained Charge 1d concerned threats and harassment against the visiting Chinese scholars "by [Professor San Filippo] repeatedly stating" that he "would send them back to China" and "by [his] directing abusive language toward them." Sustained Charge 1e concerned Professor San Filippo's interruption of a class taught by graduate student and Teaching Assistant Zong Ping Chen, and his subsequent "unprofessional, threatening and abusive" treatment of her, which treatment was "within the hearing of other individuals, including her students." The other sustained charges, in the Board's view, also constitute a clear "failure to maintain standards of sound scholarship and competent teaching," and therefore also meet the standards for a dismissible offense under applicable University regulations, even though the behaviors involved are not specifically enumerated in the national AAUP's Statement on Professional Ethics.

Professor San Filippo's attorney and the "amicus brief" filed by the Rutgers AAUP have maintained that the standards set for a dismissible offense under University Regulations are so vague as to constitute an unconstitutionally impermissible standard. The argument of Professor San Filippo's attorney and of the Rutgers AAUP is basically that a faculty member would not know how to conduct himself so as to avoid the prohibited acts. Since the national AAUP's ethical standards are the ones incorporated in the University regulations, it is basically the national AAUP's own standards which are under

attack by the Rutgers AAUP and by one of its members, Professor San Filippo.

The guidelines presented by the Statement on Professional Ethics of the national AAUP were never intended to enumerate every instance of impermissible behavior. In *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984), a tenured professor contested his dismissal for making sexual advances toward his male students on the ground that such behavior was not specifically enumerated as being among the prohibited acts in the national AAUP's Statement on Professional Ethics which Ball State had incorporated into its Faculty Handbook. Significantly, the court in *Korf* concluded:

> "As is the case with other laws, codes and regulations governing conduct, *it is unreasonable to assume that the drafters of the Statement on Professional Ethics could and must specifically delineate each and every type of conduct (including deviant conduct) constituting a violation*. Nor have we been cited any case reciting that the language of the Constitution requires such precision.
>
> > "[I]t is not feasible or necessary . . . to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct' 'immorality,' or "conduct unbecoming.' "
>
> *Meehan v. Macy*, 392 F.2d 822, 835 (D.C.Cir. 1968); *modified*, 425 F.2d 469 (D.C.Cir. 1969); *aff'd en banc*, 425 F.2d 472 (D.C.Cir. 1969). [Korf, at 1227 (emphasis added).]

The United States Supreme Court determined in *Arnett v. Kennedy*, 416 U.S. 134 (1974) that a statute authorizing removal or suspension of federal employees "for such cause as will promote the efficiency of the service" was not vague or overbroad, and could constitutionally be enforced as a dismissal standard. The New Jersey Tenure Employees Hearing

Law provision concerning dismissal of tenured employees in the public school system provides the very general dismissal standard of "inefficiency, incapacity, unbecoming conduct, or other just cause," (N.J.S.A. § 18A:6-10). The standard at issue in the present case, "a failure to *maintain* standards of sound scholarship and competent teaching." is not so vague as to be an unconstitutional standard for dismissal. The conduct encompassed by sustained Charges 1a, 1d and 1e is so reprehensible and evidences such a serious breach of the professorial role that the Board has determined that these three sustained charges alone would constitute sufficient ground for dismissal.

In addition to sustained Charges 1a, 1d and 1e, the other sustained charges also evidence "a failure to maintain standards of sound scholarship and competent teaching," although the conduct involved in each of these charges is not specifically enumerated in the national AAUP's Statement on Professional Ethics. All of these charges flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas. Sustained Charge 1c, for example, involving the lack of provision of health benefits despite representations to the contrary, along with Charge 2, in which the facts establish that Professor San Filippo directed an injured Chinese visiting scholar without medical coverage to impersonate one who was so covered, both concern Professor San Filippo's responsibilities as a teacher and scholar. The employment of such visiting scholars in faculty research is a routine part of contemporary university teaching and research, especially in the sciences. The serious lack of ethics in the employer-employee relationship found here constitutes adequate ground for finding a lack of maintenance of "standards of sound scholarship and competent teaching." Especially when foreign nationals are involved, such individuals primarily rely on the guidance of the faculty member concerned to determine the proper parameters of the employment relationship.

The teacher-scholar role also commonly encompasses supervision of other employees. Therefore, sustained Charge

3b concerning Professor San Filippo's attestation that Ms. Marilyn Brownawell, an employee of his, had worked during a week when she had in fact performed no such work falls into this category and evidences a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 4, involving the miscategorization of Peng Zhou as a postdoctoral fellow, concerns the responsibility of a teacher-scholar to act ethically in regard to the administration of his federal grant and in regard to University policy as respects the guidelines for defining such positions, and likewise can be considered to be a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 5, involving Professor San Filippo's submission of a letter of recommendation on behalf of Peng Zhou under circumstances in which the authorship and authenticity of the submitted material was found to be misrepresented, directly impacts on Professor San Filippo's responsibilities as a teacher who is part of a graduate program which depends in large part on the integrity of the faculty recommendation process. Therefore, his actions in this incident demonstrate a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 6 concerned Professor San Filippo's disobedience of the specific directive of a memorandum addressed to him by his departmental chairman. In that memorandum, Professor Boikess mandated that Professor San Filippo not permit additional graduate students work in his laboratory due to the seriousness of the allegations made against him regarding treatment of such individuals. The source of the directive was well-based concern for the students involved. Professor San Filippo's defiance of that directive was a clear failure to maintain "standards of sound scholarship and competent teaching."

Conclusion

After according "great weight" to the findings of the Senate Panel, as directed by University Regulation 3.99a, com-

pleting its own independent inquiry of the sufficiency of the evidence considered by that Senate Panel, and considering the oral and written argument submitted to it by both sides, the Board has concluded that the sum of the sustained charges constitutes a dismissible offense under the standards adopted by this University and embodied in its regulations.

In coming to its final decision, the Board has also taken into account Professor San Filippo's "previous record and his value to the University," as the Senate Panel was required to do under University Regulation 3.99. The Board accepts the Panel's assessment of Professor San Filippo's research record as "excellent," (Senate Panel Report, p. 43). However, the Board has determined that the seriousness of the offenses charged and proven cannot be overcome by Professor San Filippo's prior record.

The Board specifically finds that the conduct encompassed by the sum of sustained charges 1a, 1d, and 1e to be such a serious breach of the proper role of a faculty member that it concludes that even if Charges 1a, 1d and 1e were the only sustained charges, those sustained charges alone would be sufficient cause to warrant dismissal.

In order ultimately to uphold the meaning of the tenure system itself, it is necessary that the grant of tenure be limited by those very few, clearly defined and circumscribed circumstances under which the University must act to revoke tenure in order to protect its integrity and purpose. The Board awards tenure with the expectation that barring such circumstances as are set forth under University Regulations, the Board will not have to act to revoke its original decision to grant such tenure. However, the present case is one of those few exceptions which demand such action.

In coming to its final decision, the Board has carefully considered the gravity of the sustained charges against the equally grave penalty of dismissal. After according Professor San Filippo his full due process rights to answer the charges, and taking into account his previous record, the Board finds that in light of all the evidence it has considered, and according "great weight" to the findings of tho Senate Panel, as it is

directed to do by University Regulation 3.99a, it has determined to affirm the unanimous recommendation of the Panel that Professor San Filippo be dismissed from the University. The Board therefore directs that Professor Joseph San Filippo, Jr. be dismissed from the University, thereby revoking his tenured appointment, and terminating his employment with the University, effective today, May 13, 1988, the date of the vote of the Board[8] on this matter.

We, the undersigned members of the Board of Governors,[9] join in the determinations set forth in this Opinion.[10]

/s/ MICHAEL BONGIOVANNI
Michael Bongiovanni,
Chairman

/s/ ANTHONY S. CICATIELLO
Anthony S. Cicatiello

/s/ ADRIENNE S. ANDERSON
Adrienne S. Anderson

/s/ DONALD M. DICKERSON
Donald M. Dickerson

/s/ FLOYD H. BRAGG
Floyd H. Bragg

/s/ NORMAN REITMAN
Norman Reitman

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[8] The Resolution dated May 13, 1988 of the Board of Governors on this matter is set forth in Appendix D.

[9] Four voting members of the Board, Peter Cartmell, Harold S. Perl, James L. Usry, and David A. Werblin, did not participate in the oral argument on March 11, 1988 and subsequent review and deliberations of the Board.

[10] Board of Governors member Walter Wechsler dissents from this Opinion for the reasons given in the attached statement.

Dissenting Opinion of Walter Wechsler from the Opinion of the Majority of the Board of Governors in the Matter of the Proceedings to Dismiss Professor Joseph San Filippo, Jr.

Two thousand years ago Cicero enjoined public officials to take care "that the punishment should not be out of proportion to the offence."[1] On the basis of three infractions, the Board has voted to impose the ultimate sanction and dismiss Dr. San Filippo despite his years of extraordinary service and profound contributions to the University. Because this punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus, I respectfully dissent.

I.

The three transgressions that are said to warrant the dismissal of Professor San Filippo occurred in mid-1985. The majority notes that these proceedings were initiated on January 6, 1986, following an informal discussion of the charges between Dean Edelstein and Professor San Filippo on November 25, 1985.[2] This official chronology ignores an earlier bitter controversy between Professor San Filippo and the University and the role that controversy may well have played in the decision here to impose the severest of penalties.

In 1985 Professor San Filippo and the University arbitrated his right to a "merit increase" under the faculty contract in effect in 1984.[3] The hearings in that arbitration concluded on September 10, 1985—just ten weeks before Professor San

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[1] Cicero (106-43 BC), *De legibus*, bk III, ch. XX.

[2] See Majority Opinion, Procedural History, p. 1-2. The discussion of the "Procedural History" tracks the official "San Filippo Chronology" distributed to the Board by the University Counsel.

[3] The Arbitrator's opinion (In the Matter of the *Arbitration Between Rutgers University and Rutgers Council of AAUP Chapters*, No. 84-908) was admitted by the University Senate Panel as Exhibit F-16.

Filippo was advised of the charges against him in this matter. The arbitrator's factual findings in that matter have considerable bearing in this case, particularly those concerning the University's animus toward Professor San Filippo and the credibility of those faculty members who testified against him on its behalf.

The arbitrator found in favor of Professor San Filippo because the process through which he had been denied a merit raise was "highly irregular." The arbitrator rejected as "simply not true" the testimony of Dr. Boikess, Chair of the Chemistry Department, that Professor San Filippo's application has been "evaluated on the same criteria as everyone else."[4] He rejected similar testimony by Dr. Potenza as "not credible." Instead, the arbitrator found that Professor San Filippo's application had been denied arbitrarily because they and other faculty members felt that he was "abrasive and obnoxious." As the arbitrator observed, in that matter Professor San Filippo "lost out because his colleagues do not like him."

A careful review of the record in this matter leaves me with the disconcerting belief that Professor San Filippo lost out here not by virtue of his wrongful conduct, but rather "because his colleagues do not like him."

II.

I do not take issue with the underlying factual findings against Professor San Filippo. Under the governing regulation, we are required to "accord great weight to the findings of the [Senate] panel," and there is clearly sufficient evidence to sustain the findings that Professor San Filippo committed the specific offenses alleged in charges 1a, 1d and 1e. However, the Senate Panel did not explain or justify in any respect its decision to recommend dismissal—the severest sanction

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[4] The arbitrator specifically sound that Dr. Boikess had been evasive and disingenuous in claiming that he could not remember certain key events.

possible—instead of probation or any other available sanction. Instead, it simply recited in conclusory terms that it had "considered" the evidence and concluded that dismissal is warranted. Accordingly, in so far as the Senate Panel decided to impose the ultimate sanction without explanation, there really is nothing to which we can or should "accord great weight."[5]

Neither the Senate Panel nor the majority cite any precedent for the imposition of this harsh sanction. We do not know whether other faculty members have been charged with similar offenses, and if so, how those charges were resolved. Indeed, it is quite possible that these charges against Professor San Filippo might have been resolved informally had he been well-liked by his colleagues. It is difficult to imagine that, among the thousands employed by the University, only Professor San Filippo has committed offenses of this nature.

What is most troubling is the Senate Panel's failure to address this issue, even though Professor San Filippo raised it. For example, the Senate Panel catalogs Professor San Filippo's responses to Charge 1a, including his contention that "other faculty members have students do uncompensated work for them." The Senate Panel does not tell us whether this is true and, if so, whether that would or should make any difference in its judgment. Instead, it merely recites that: "The Panel has considered these and other responses of [Professor San Filippo] in reaching its finding." This is not enough.

The Senate Panel likewise acknowledges that:

> Professor San Filippo has an excellent record as evidenced by his long list of publications and promotion to the rank of Professor in 1984. He has received over a million dollars in research grants and awards. He has

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[5] The majority likewise recites that they have "carefully considered the gravity of the sustained charges." However, the majority appeared to "accord great weight" to the Senate Panel's unexplained choice of sanction and on that basis "determined to affirm." Thus, neither the Senate Panel nor the Board address in meaningful terms the appropriateness of the sanction imposed.

> worked with industry to bring together funding for equipment at Rutgers. He is an active research[er] with an international reputation and a senior member of the Chemistry department. His research accomplishments are an asset to the University's quest for excellence and distinction.

Here too the Senate Panel tells us, in conclusory terms, that Professor San Filippo's "excellent research record and his contribution to the University . . . were considered by the Panel in reaching its decision." Does the Senate Panel mean to imply that, no matter how great the faculty member's contribution, offenses of this nature must always warrant dismissal? Or is that a rule only to be applied to Professor San Filippo?

Finally, the Senate Panel did not account for other concerns it raised and then promptly ignored. It was "disturbed by the University's reluctance to bring Professor San Filippo into the investigation earlier," thus suggesting that his defense may have been prejudiced by the delay. At the least, it certainly suggests animus against his. There is also no evidence that Professor San Filippo was warned of his problems before hand, so he could modify his conduct accordingly. Once again, the Senate Panel makes these observations but then, in conclusory terms, only tells us that "[t]hese observations in no way alter our conclusions." Why not?

The sanction imposed on Professor San Filippo could be the death knell of his career in higher educatior.. Before sustaining that sanction, we must insure that it was chosen as the result of objective and careful deliberations and is proportionate to the offense. Because the Senate Panel did not articulate its reasoning sufficiently here to insure that these criteria were met in this instance, I cannot, in good conscience, concur in its judgment.

/s/ WALTER WECHSLER
Walter Wechsler

APPENDIX G

REPORT OF THE HEARING BEFORE THE PANEL SELECTED FROM THE RUTGERS UNIVERSITY SENATE IN THE MATTER OF THE PROCEEDINGS TO DISMISS PROFESSOR JOSEPH SAN FILIPPO, JR.

Ted H. Szatrowski, Chair
Noel DaCosta
Mary Fetzer
Richard Hixson
David Wilder

December 21, 1987

CHARGE TO THE PANEL

The panel shall determine whether the charges, or any part thereof, are true; whether the matters charged and proved constitute ground for dismissal under section 3.93 above; and whether, taking into consideration the respondent's previous record and his value to the University, he should be dismissed or otherwise disciplined.

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INTRODUCTION

Before addressing the findings and recommendations of the Panel, a brief review of the time and effort committed by the Panel is in order.

In response to President Bloustein's letter of October 1, 1986, which formally notified Professor San Filippo of the charges against him, Professor San Filippo requested a public hearing as provided by University Regulations 3.90-3.99a. The hearing panel was selected from among elected members of the Rutgers University Senate. A meeting of the five panelists was convened by the Chair of the University Senate on December 5, 1986. After some brief discussion, a Chair was selected by the Panel. This concluded any further participation by the Chair of the University Senate in the matter before the Panel.

The Panel had twelve meetings including two meetings with the attorneys for the University and Faculty Member prior to the start of the evidentiary phase of the hearings on March 30, 1987. During this period, the Chair wrote approximately 13 letters (internal and external correspondence, 36 pages, single spaced) and the Panel reviewed approximately forty pieces of correspondence. The substance of these meetings involved procedural issues.

Forty-six days of hearings were transcribed generating over 5,800 pages of testimony from 33 witnesses, and over 400 exhibits. These 46 days of hearings involved 250 scheduled hours. They commenced on March 24, 1987, and concluded with closing arguments on September 22, 1987. Copies of all transcripts were received by the Panel by the end of October, 1987. An additional twenty-six hearing dates set during this period were cancelled, primarily at the request of the Faculty Member. Parts or all of eighteen hearings were videotaped by the Chair of the Panel to allow the hearings to continue when a panelist could not attend all or part of a scheduled hearing due to other commitments. The Panel had twelve meetings after the closing arguments. An enormous amount of additional time, aside from attending Panel meetings and hearings,

was spent on this matter by members of the Panel before, during and after the hearings.

Members of the Panel continued with their normal duties during the hearings. While it was possible in some cases to curtail non-teaching duties, in most cases it was not possible to shed these other duties. Terms of election to the University Senate of four of the five members of the Senate expired on June 30, 1987. The remaining member was on FASP leave for the 1987-88 academic year. Spring and Summer terms were "Summer, off-terms" for the Chair of the Panel (due to the trisemester schedule of the Graduate School of Management). Without these "off-terms" and the videotaping of hearings by the Chair to overcome scheduling difficulties, it would have been impossible for this Panel to move the proceedings to conclusion as rapidly as was done.

After sixteen days of hearings, the University rested its case. Eighteen hearing days later, on July 28, 1987, the Panel announced to both sides its concern for the length of time that the hearings were taking. During a break in the hearings from July 29 through August 30, the Panel requested that both parties submit to the Panel a list of any additional witnesses that they planned to call, with a brief description of what each witness would testify to, in sufficient detail so the Panel could decide whether or not this information was relevant and material to the matter before the Panel. Based on the information received by the Panel, the Panel decided that nine more days of hearings should provide both sides ample opportunity to conclude their evidentiary presentations. Equal time was allocated to both sides for these scheduled nine days. The Chair timed each side with a chess clock, allocating time to each party depending upon which party currently was presenting. Cumulative time was announced at the end of each day of hearing. This decision was protested by the Faculty Member. The Panel has found no reason to alter its decision, either prior to the end of the hearings, or as of the date of this report.

The remainder of this report is divided into three sections. Section A contains the FINDINGS of the Panel on each charge. The RECOMMENDATIONS of the Panel are given in

Section B. Section C contains a brief OBSERVATION of the Panel. [Transcript references are of the form [Volume:Page]. "U-", "F-" and "P-" refer to University, Faculty Member and Panel exhibits, respectively.]

A. FINDINGS

In this section, the six charges in President Bloustein's October 1, 1986, letter to Professor San Filippo are listed (in boldface) along with the Panel's findings for each charge. President Bloustein included with his letter 133 exhibits which the Panel did not consider as part of the charges. The Panel did this without prejudicing any future consideration of these exhibits during the hearings if either party decided to enter them into evidence. With the exception of the specification of the time report for the week ending November 9, 1984, as included in Charge 3 as 3c, (a specification made on the second day of evidentiary hearings), [3:99-102], these six charges constitute the matters before the Panel.

1. **Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to these individuals, as set forth more fully in the attached documents, is as follows:**

    a. **You took advantage of your professorial position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.**

Mr. Hetian Gao arrived in the United States around April 25, 1985. He did outside work at Professor San Filippo's residence on one day in each of the first, third and fourth week-

ends of May, 1985 and on July 4, 1985. The work included activities such as digging, removing soil, pulling out vines, fertilizing, planting ground cover, and moving a cement slab, activities which involved a significant amount of work and time.

Mr. Changhe Xiao arrived in the United States around June 6, 1985. On July 4, 1985, he worked at Professor San Filippo's house cleaning and washing windows and the front porch. He was injured when he fell off a ladder while doing the cleaning work.

On each of these occasions, Messrs. Gao and Xiao were invited to Professor San Filippo's house not by Professor San Filippo, but by Mr. Peng Zhou, a Chinese scholar who had joined Professor San Filippo's research group in July, 1984. Professor San Filippo testified that he had personally assisted his visiting Chinese scholars in setting up bank accounts, getting social security numbers, and similar activities. He also testified that he probably had Mr. Zhou do this type of activity for Mr. Gao and Mr. Xiao [36:82]. Mr. Zhou also conveyed information, such as salary information, from Professor San Filippo to Mr. Gao and Mr. Xiao and was the one to invite Messrs. Gao and Xiao to the Professor's home.

Professor San Filippo did not directly invite Mr. Gao and Mr. Xiao to come over to his house or direct them to do uncompensated work for him. However, when they had just come to the United States he spoke to them in a threatening and abusive manner (see Charge 1d). He let them know that if their work in the laboratory was not adequate, he would write their supervisors back in China. Concurrent with this abusive conduct, he invited several visitors from China over to his house, including Mr. Zhou, and let them know that they could invite others if they wished. Professor San Filippo claimed that he opened his house to these individuals, and testified that his intention was that these were social gatherings, and that visitors were free to use his house, watch television, listen to his stereo and generally make themselves at home. He testified that he planned outside activities such as garden work for himself on these days when he had visitors.

On the days in May and July, 1985 that Mr. Gao and Mr. Xiao were at the Professor's house, Professor San Filippo picked them up and drove them back to their apartments. He also took Mr. Gao and the other visitors out to lunch on three of the four days that Mr. Gao was at his house in May and July, 1985 and paid for their lunches. On the other occasion, he was sick and gave his visitors $20 each for lunch at the time they went home after working at his house during the morning. Mr. Xiao missed the opportunity to go out to lunch on July 4, 1985 because of his injuries. Neither Mr. Gao nor Mr. Xiao was offered or paid any compensation for their work.

The Panel sustains this charge. Professor San Filippo took advantage of his professional position and exploited these visiting scholars in a manner that was demeaning and insensitive. Given his abusive and threatening treatment of Messrs. Gao and Xiao, their recent arrival in the United States, and his position as their supervisor, Messrs. Gao and Xiao had little choice in their response.

The Faculty Member's responses to this charge included that: (1) he never knew Mr. Gao or Mr. Xiao were coming on these occasions [37:36]; (2) the amount of work involved was insignificant; (3) there was no evidence that he led them to believe that they had no choice; (4) the University investigation of these charges was faulty; (5) there are inconsistencies in the description of the activities at his house; (6) other faculty members have students do uncompensated work for them; (7) there is no evidence that Mr. Gao complained to any of the other Chinese visitors at his house; (8) Professor San Filippo integrated his professional and social life, and any work done was done in a social context; (9) other Chinese scholars who had just arrived in the United States also visited his house; (10) Mr. Gao and Mr. Xiao came to a barbecue in October, 1985, at his house; and (11) these complaints were generated because he purportedly was asked by these individuals in August, 1985, for his support in applying to graduate school, support which he would not give at that time. The Panel has considered these and other responses of the Faculty Member in reaching its finding.

While the Panel sustains this charge, it is disturbed by the University's reluctance to bring Professor San Filippo into the investigation earlier. Also, despite the severity of this charge, the students must have felt at some point that they were under great pressure in what had become a struggle between the University and one of its faculty members. These observations in no way alter our conclusions.

b. You attempted to exploit Ms. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for you.

This charge is unproven. Professor Yaru Zang did not testify. The two statements purportedly of hers that were submitted into evidence by the University contained no statements related to this charge. The only evidence submitted to the Panel consisted of brief statements from several witnesses concerning statements that Professor Yaru Zang allegedly had made.

c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide such coverage to either Mr. Gao or Mr. Xiao.

It is undisputed that Professor San Filippo made a representation to Professor Boikess, Chairman of the Chemistry department, that he planned to provide health benefits to Mr. Gao and Mr. Xiao [U-11; 4:13]. Professor San Filippo testified "I seem to remember telling Boikess that I intend to provide health benefits to them as post-docs, meaning health benefits from my grant, payment through my grant." [37:33]. Professor Boikess in his January 18, 1985, memo [U-11] to Professor San Filippo writes "Since you told me that you plan to pay for health benefits in addition to the $7,300 stipend for these two scientists, the use of this title should not cause you

any problems." Professor Boikess signed and sent to Professor San Filippo with this memo the application forms for the IAP66 for Messrs. Gao and Xiao after changing their title from Visiting Scholar to Visiting Investigator. The IAP66 forms for these individuals were signed six days later on January 24, 1985 [U-25A, U-44].

Professor San Filippo's representation to Professor Boikess is the only representation in evidence that Professor San Filippo would provide health benefits to Mr. Gao. There is no evidence of his making this representation in any form prior to Mr. Gao's arrival at Rutgers directly to Mr. Gao or to any individual who might represent Mr. Gao or act as an intermediary between Mr. Gao and him. Professor San Filippo did not provide health coverage for Mr. Gao. The Panel notes that no evidence was introduced to indicate that he would be required as a matter of course to provide Mr. Gao health benefits as per some general University policy or regulation in the absence of his representation to do so. The Panel notes that the University administration was aware that Mr. Gao was not receiving health benefits on April 29, 1985, as evidenced in Dean Stubaus' memo of that date to Professor San Filippo [F-114]. There is no evidence before the Panel that Professor San Filippo was told of any sanctions that would be imposed if he did not provide health benefits to Mr. Gao at this time, even though Professor Boikess was knowledgeable about his representation of January, 1985, and was copied on Dean Stubaus' memo. The Panel does not sustain this charge with respect to Mr. Gao.

In the case of Mr. Xiao, a letter dated January 16, 1985, from Professor San Filippo to Professor Lin Shao-Fan with an enclosed IAP66 form for Mr. Xiao was entered into evidence by the University [U-25]. In this letter, Professor San Filippo made a clear representation that he planned to provide medical insurance for Mr. Xiao. Mr. Xiao [6:16] said he had seen this letter when he was in China and it led Mr. Xiao to believe that Professor San Filippo would provide him with health benefits. Professor Lin Shao-Fan was Mr. Xiao's supervisor. There was no evidence to indicate that Professor San Filippo

communicated directly with Mr. Xiao while Mr. Xiao was in China concerning his joining Professor San Filippo's research group. Ample evidence was provided to demonstrate that he did not provide Mr. Xiao with medical insurance upon Mr. Xiao's arrival or in a reasonable period thereafter.

Professor San Filippo testified that he told Mr. Xiao in a conversation on June 6 or June 10, 1985, that Mr. Xiao should get an application for health insurance at the International Center [31:60]. He testified that in this conversation he told Mr. Xiao he could not keep the condition of his letter to Mr. Xiao's supervisor [U-25] because of developments in the department [31:62]. He did not recall any discussions between him and Mr. Xiao concerning health insurance, concerning the payment of premiums for health insurance or concerning whether or not Mr. Xiao had obtained insurance from the International Center between June 10 and July 8, 1985 [31:61]. Mr. Xiao testified that before he got hurt, Professor San Filippo never mentioned anything about insurance [9:89].

Professor San Filippo did not effectively follow though on his commitment to Mr. Xiao prior to Mr. Xiao's injury on July 4, 1985, that he would or could not provide the health insurance that he wrote about in his letter to Professor Lin Shao-Fan in January, 1985. In addition, the Panel has serious doubts about whether any conversation on this topic took place in June, 1985. The Panel sustains this charge with respect to Mr. Xiao.

The Faculty Member's responses to the charge included: (1) that Professor Boikess prevented Messrs. Gao and Xiao from receiving health insurance when he changed their title from Visiting Scholar to Visiting Investigator; (2) that Messrs. Gao and Xiao by arriving late made themselves ineligible for health insurance; (3) that he believed Mr. Gao would automatically receive health benefits when he appointed him on April 25, 1985; (4) that he did not appoint them for a year even though they arrived late because (a) their projects would take less than a year, and (b) Professor San Filippo was uncertain of their abilities. The Panel has considered these and other responses of the Faculty Member in reaching its findings on this charge.

Professor San Filippo suggested that he planned to appoint Messrs. Gao and Xiao as Postdoctoral Fellows so they would receive insurance under that program, available even if they were appointed for a period of less than one year [37:33]. If he had done this, these individuals would be most likely listed under Charge 4 as being inappropriately made Postdoctoral Fellows and the Panel would have sustained that charge with respect to these individuals. Neither had a Ph.D. and the Pallone memo of July 17, 1984, [U-3] (see finding for Charge 4) does not include these individuals as Postdoctoral Fellows. Professor San Filippo had no reasonable reason to believe these individuals could properly be titled Postdoctoral Fellows.

Finally, the Panel must note that Professor San Filippo's representations to Messrs. Gao and Xiao concerning their employment conditions were very poor or non-existent. For example, on one hand Professor San Filippo wrote on December 1, 1984, to Professor Huang, Mr. Gao's professor, that he had reservations about Mr. Gao's abilities and stated that he had decided to offer Mr. Gao a one-year appointment rather than a two-year appointment which would be extended for a second year if Mr. Gao's performance was satisfactory [F-67]. On the other hand, Professor San Filippo testified "the terms of Mr. Gao's employment with me was the completion of a project. That was why I wanted him there. To complete that project, he could have easily completed that project in six months." [34:94]. Ample evidence was provided to the Panel to sustain a charge regarding Professor San Filippo's poor employment practices were such a charge before the Panel.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

Mr. Xiao testified that Professor San Filippo lost his temper in an exchange over differing computer commands [6:35], and again over his request to be taken to the hospital [6:76].

He said that at this point Professor San Filippo also threatened to send him back to China [6:76]. Mr. Gao substantiated Mr. Xiao's testimony regarding the exchange over Xiao's request to be taken to the hospital [11:9]. Both Mr. Xiao [6:89] and Mr. Gao [11:11] testified to similar experiences with Professor San Filippo when in early August, 1985, upon learning that neither Mr. Xiao nor Mr. Gao had yet gone to get health insurance from the Chinese consulate Professor San Filippo lost his temper with each of them and stressed to them that he was their boss. Mr. Xiao said that the Professor threatened to send Mr. Gao back to China in a conversation between Mr. Xiao and Professor San Filippo that day and that the Professor called Mr. Gao "really stupid" [6:89]. Mr. Gao testified that Professor San Filippo became angry with him during their initial meeting at the Professor's office, and that the Professor threatened to send him back to China if he did not perform to his satisfaction [9:111, 10:10].

The Panel found this testimony credible. In addition, the Panel notes that such incidents were consistent with descriptions of other witnesses of Professor San Filippo's behavior, and his interactions with individuals working with him. These descriptions were given by witnesses presented by the University and the Faculty Member. These descriptions included incidents of yelling, cursing, calling individuals stupid and using phrases like "send you back to China". Professor San Filippo frequently lost his temper at work, often at individuals working in his laboratory and under his supervision. (see also Charge 1e). [12:86, 13:29, 41:38, 41:107, 44:4, 44:78, 45:76,79, F-140, F-141, F-175, F-176].

The Faculty Member's responses to the charge included: (1) questioning the credibility of witnesses; (2) denial of the threats to send anyone back to China, [21:69, 24:7]; and (3) the work performance and actions of Mr. Gao and Mr. Xiao were unsatisfactory. The Panel considered these and other responses of the Faculty Member in reaching its finding to sustain this charge.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

Sufficient evidence was provided to the Panel to sustain this charge. Two students and a Rutgers staff member testified that Professor San Filippo called Ms. Chen out of the middle of a laboratory session which she was running for students in her role as a TA in Beck Hall. They testified that he used a loud, harsh, angry voice and yelled and used obscenities in his discussion with Ms. Chen [13:8,16,24]

Ms. Chen testified [13:40] that Professor San Filippo was angry she had not told him about a notice that she had received from the Chemistry department. This notice stated that she had been placed on the "wait-list" for the next semester's TA assignment. She testified that she received this information on Friday afternoon, three days earlier, but could not find Professor San Filippo to tell him. On Monday, the day of the incident, Ms. Chen had two laboratory sections from the morning to the afternoon, and, thus, had not had time to tell him. She tried to explain this to the Professor, but at that time he was very angry and would not listen. Ms. Chen testified that she knew he was angry from the tone of his voice, "not very nice and very loudly and serious" and from his face "turning blue and he looked—his expression was very severe" [13:43]. She also testified that his office is located in another building on another campus approximately ten minutes away from Beck Hall where Ms. Chen was holding her laboratory session. Following this incident which occurred within the hearing of her students, Ms. Chen testified that she felt humiliated and embarrassed. She felt Professor San Filippo was very angry with her [13:88]. Ms. Chen testified that after the incident she was very upset and that it adversely affected her performance in helping students during the laboratory session that afternoon [13:47].

The Faculty Member's responses to this charge included an explanation of his state of mind and the pressures that he was under at this time, and that Ms. Chen being put on the "wait-list" for TA's was another attack on his research group. Also, Ms. Chen was upset because of the strains that a possible loss of her TA would put on her. In addition, he was frustrated that she was naive and had not obtained earlier statements concerning her status as a TA in writing. The Panel does not find that the Faculty Member's responses justify, explain or excuse his unprofessional, threatening and abusive treatment of Ms. Chen and the disruption of the learning environment.

2. On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance at your house, to identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

Mr. Xiao was injured in a fall from a ladder while doing cleaning work on the front porch of Professor San Filippo's house on July 4, 1985. The evidence clearly shows that Professor San Filippo allowed Mr. Xiao to use Mr. Zhou's medical insurance card at Middlesex General Hospital on July 8, 1985, when he drove Mr. Xiao and Mr. Zhou to the hospital in order to obtain medical treatment for Mr. Xiao's injury. The Panel has no doubt that this misrepresentation would not have taken place if the Professor had not gone along with it. The Panel finds it irrelevant as to whether Professor San Filippo "directed" Mr. Xiao to so identify himself, or whether following a discussion with Professor San Filippo, Mr. Zhou made this suggestion to Mr. Xiao.

Professor San Filippo denies attempting to have Mr. Zhou's insurance pay Mr. Xiao's medical bill [21:60]. Professor San Filippo testified that he reluctantly went along with allowing Mr. Xiao to use Mr. Zhou's medical insurance card. The Professor testified that he did this to avoid delay in obtaining medical treatment [27:39] and with the proviso that when the bill came to Mr. Zhou, that Professor San Filippo would pay it [27:40]. The Professor testified that he took Mr. Xiao to the

emergency room "Went up to the nurse, told her my name, told her what had happened to him, that he had fallen off a ladder, that he was an employee of mine, worked in the laboratory." [27:40] Professor San Filippo told the nurse at the hospital that he would be guarantor and gave her his office phone number [27:41]. At the hearings, Professor San Filippo presented a copy of the bill for $182 and the envelope (postmarked April 18, 1986, addressed to Mr. Peng Zhou) [F-126, F126A] which he said he received from Mr. Zhou, as well as a copy of a check for $182 dated April 21, 1986, [F-127] which Professor San Filippo used to pay this bill. The Professor noted that the address on the envelope was different from the address on Mr. Zhou's medical insurance card. Professor San Filippo had Mr. Zhou give the collection agency Mr. Zhou's current address in response to a Spring, 1986, call from the collection agency regarding this unpaid bill [27:45].

The Panel finds these explanations unacceptable. Professor San Filippo did pay the bill nine months after the July 8, 1985, hospital visit, when it was in the hands of a collection agency. The Panel notes Professor San Filippo's failure to follow up, inquire of the hospital as to the status of the bill, and to pay this bill in a timely fashion. The Panel sustains Charge 2.

3. You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:

   a. In or about August 1985, Ms. Abbie Lieber, a secretary who works solely under your supervision submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had not performed any extra work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

The Panel finds that Professor San Filippo did authorize payment of $100.00 to Mr. Gao and Mr. Xiao for extra work for the pay period 7/22/85 through 8/2/85 knowing that they did not do any extra work during or prior to this period that justified this payment. The purpose of the payment was to reimburse these individuals for the purchase of health benefits from the Chinese consulate. Although the Panel has doubts as to whether the Professor assigned extra work for these payments, the Panel does not find that either (1) Professor San Filippo did not assign any extra work for this money, or (2) that Professor San Filippo did assign extra work, but it was not completed by Mr. Gao and/or Mr. Xiao.

While a make-work project was one possible way to pay $100 to these individuals for the purchase of health insurance, Professor San Filippo should have first checked to see if he could pay the amount directly from his grant. Professor San Filippo explained that Mr. Gao's rent was paid from his grant with an internal purchase order. But, he explained further, both a time factor and his uncertainty as to whether it was

appropriate to pay for the insurance directly through a grant and/or whether it was possible to get a check to be sent with an insurance application form led him to assign this make-work project. [27:57]. The Panel did not find this excuse sufficient reason for the Professor's not making a phone call to get further information. Surely, Professor San Filippo could have picked up the phone and checked his concerns about the $100 payments with the Research Contracts Office.

Despite these reservations, the Panel does not sustain Charge 3a.

b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

Sufficient evidence was provided to the Panel to sustain this charge. Ms. Brownawell testified that she did not work during the week ending August 17, 1984, and that she signed both the time report and employee time record for this period on which 40 hours of work was listed. Her signature appears next to the statement in quotes, "I certify that the distribution of pay on this report accurately represents the efforts expended during the period indicated." In addition, Ms. Brownawell testified that Professor San Filippo knew she was taking that week off and he knew that she was getting paid for that week. [43:103-107]. During this period, Ms. Brownawell was a Type 4 employee, a type which is paid for hours worked and is not entitled to compensatory time off or vacation time [2:66].

The Faculty Member suggests that there are important mitigating circumstances. Ms. Brownawell was a consultant for Professor San Filippo during the period January 1, 1981, through July 31, 1984. In August, 1984, she was made a Type

4 employee. During the period that Ms. Brownawell was a consultant, Ms. Brownawell and the Professor testified that they had an informal (unwritten in the consultant contract) understanding that she was expected to work a 35 hour week for which she received a salary. Under this alleged understanding, if Ms. Brownawell worked in excess of 35 hours, she could use this time as compensatory time; if she worked less than 35 hours and had not accrued compensatory time, her salary would be reduced. During the first year of the consultant agreement, Ms. Brownawell testified that she had accumulated hundreds of hours of compensatory time, after which she never kept a running total. Professor San Filippo testified that Ms. Brownawell had accumulated hundreds of hours of compensatory time by the end of 1983 [24:156]. Ms. Brownawell testified that based on a summary of her hours worked during the period of time January 1, 1981, through August, 1984, she had accumulated over 700 hours of uncompensated time based on a reconstruction from her diaries and the "35 hour week" informal understanding. She testified that this reconstruction [F-58] was begun in late 1985 and completed more than a year later [43:96].

Around June, 1984, the question of Ms. Brownawell's status was investigated and a determination was made that she should be classified as an employee, not as a consultant. While her position was being evaluated, Ms. Brownawell was made a Type 4 employee at Professor San Filippo's request because he was departing for a trip of several months duration to China starting in mid-August, 1984. Professor San Filippo testified that he had asked the business manager of the Chemistry Department, Mr. Jack Gordon, what the ground rules were for Type 4 employees and that Mr. Gordon said he'd get back to Professor San Filippo after checking with the Office of Wage and Salary. In one conversation with Mr. Gordon prior to Professor San Filippo's departure to China, the Professor testified that Mr. Gordon asked him " 'What objection do you have to the status quo, Joe?' And I said none. I have no objections to it." [24:157]. Prior to leaving for China, Professor San Filippo testified that he understood that he "could

continue to operate the way I had until he found out otherwise." [24:158].

The Panel finds the Faculty Member's response to this charge unacceptable. Even assuming that the explanation presented by the Faculty Member is true, it does not present a set of mitigating circumstances. Ms. Brownawell should have been employed by Professor San Filippo as a University employee with the rights, benefits and responsibilities of such a position rather than as a consultant. More importantly, Professor San Filippo allowed hundreds of hours of uncompensated hours to remain outstanding, if one believes their informal understanding, when Ms. Brownawell was made a Type 4 employee. Instead of informing the Administration of the problem of her purported compensatory time, he did nothing about this problem. His claim that Mr. Gordon gave him permission to maintain the "status quo" is no mitigating factor. Neither is his claim that he did not understand the rules of a Type 4 employee. There is no evidence that Professor San Filippo gave Mr. Gordon complete information about the situation. The Panel notes that fringe benefits are charged to grants at a rate of 25% of salary for employees, and that no such charge is made for consultants.

c. Ms. Brownawell was inappropriately paid for the week ending November 9, 1984.

This charge did not appear specifically in President Bloustein's October 1, 1986, letter to Professor San Filippo. The charge was specifically referenced on the second day of the evidentiary hearings. The Faculty Member objected to its introduction and then withdrew the objection prior to a ruling by the Panel [3:99-102]. The Panel has formulated the wording of this charge since no specific wording was given for it.

The Panel does not sustain this charge. Ms. Brownawell testified that she was taking a week long Hewlett-Packard Systems Manager's course from November 5 through November 9, 1984, in Santa Clara, California. This training was taken to allow her to run the Mass Spectrometer after an $80,000 upgrade was done to the instrument. She presented

convincing evidence that she worked the time charged during this week [9:18]. Professor San Filippo testified that this course was necessary for her operation of the upgraded Mass Spectrometer. [24:177]. Professor San Filippo, Ms. Brownawell's immediate supervisor, authorized Ms. Brownawell's taking of this course. No testimony was given that this was an inappropriate payment under these conditions.

4. You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows Chinese scholars who you knew did not have appropriate credentials and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.

This charge involves the appointments of Mr. Cong-Yuan Guo as a postdoctoral fellow [U-104, 4/22/82] and of Mr. Zhou as a postdoctoral fellow [U-53, 8/8/84]. Both of these individuals were Chinese scholars who came to Rutgers to work with Professor San Filippo. Mr. Guo received his education from Nankai University (1972-1975, no degree listed [F-196]). Mr. Zhou attended Jilin University from 1978 to 1982 and received his B.S. in Chemistry from Jilin [U-62]. Both of these individuals worked as research associates after these periods. Neither had (or currently has) a Ph.D. Professor San Filippo wrote letters of recommendation for admission to the graduate program in Chemistry for Mr. Guo [U-71] and Mr. Zhou [U-65].

Professor Robert Boikess, Chairman of the Chemistry Department, testified [4:20] that a "Postdoctoral fellow is normally someone who has a Ph.D. In rare instances, it is someone who has the seniority, the experience, the experience in doing research. That's essentially associated with the process that we normally give a Ph.D. for, somebody who is relatively quite senior person." He also indicated that "a

postdoc is not an employee of the University. A visiting investigator is an employee of the University. I think there are substantial differences between being an employee and not. It gives you certain responsibilities with respect to the University. It gives the University responsibilities with respect to you" [4:27]. He also indicated that there is a 25% charge for fringe benefits to a grant funded Visiting Investigator [4:28].

The Panel does not sustain this charge with respect to the appointment of Mr. Guo. Professor San Filippo had sponsored three Chinese scholars in July, 1981, prior to Mr. Guo's arrival [27:34]. He testified that he had a discussion with Professor Potenza, Chairman of the Chemistry department at that time with respect to the assignment of the postdoctoral fellow title for these individuals as well as discussion with Ms. Shirley Maimone, Administrative Assistant in the Chemistry department [34:76]. These Chinese scholars quite plausibly fit Professor Boikess's definition of exceptions to the postdoctoral title. It certainly may have been advantageous to Professor San Filippo that no fringe benefits were charged to his accounts for these individuals. Health insurance was available to these individuals through the International Center [27:32]. Mr. Guo's appointment in 1982 as a postdoctoral fellow was perhaps more questionable than that of the first three Chinese scholars. He had finished with studies at Nankai University in 1975 and was coming to Rutgers in 1982. The Panel gives Professor San Filippo the benefit of the doubt on this issue due to the proximity of this appointment to that of the previous individuals and due to the absence of clear guidelines as to exceptions to the definition of postdoctoral fellow in cases without a Ph.D.

Professor Boikess wrote Professor San Filippo on January 31, 1985, [U-12] regarding the appropriateness of Mr. Zhou's appointment as a Postdoctoral Fellow. Citing Mr. Zhou's 1982 B.S. degree at age 24 and Mr. Zhou's statement in his application to graduate school that Mr. Zhou's "contribution has always involved technician work", [U-36 excerpt], Professor Boikess states that it "seems clear that Mr. Peng Zhou does not have the training equivalent to a Ph.D."

A memo concerning postdoctoral fellows of 7/17/84 was sent to selected members of the University community including Principal Investigators authored by Nathaniel J. Pallone [U-3]. On page 4 of that memo, postdoctoral research fellows were defined "as a category of graduate students who have very recently received their doctorate, ... Persons who do not fit this description should either be terminated or should be moved to the status of employees (e.g., as Research Associates) with full provision of fringe benefits. Such changes in status must be made either by the end of the 1984-85 fiscal year or at the termination of the current one-year grant period, whichever comes earliest." Note that the date of the Pallone memo is prior to the 8/8/84 appointment of Mr. Zhou [U-53].

Ms. Maimone testified that whereas for other faculty she can sign payroll papers, Professor San Filippo must countersign payroll papers for his accounts [13:97]. This countersigning includes Payroll Authorization Forms. Ms. Maimone testified that she did not choose the title of "Postdoctoral Fellow" for Mr. Zhou, that this title was chosen by Professor San Filippo [13:108]. Ms. Maimone also testified that she had a conversation with someone in the Dean's office concerning the initiation of a postdoctoral appointment which resulted in a response, to the best of her recollection, to the effect that if the offer was made before the Pallone memo, it would be okay to put the individual on as a postdoctor. She did not remember if it was Mr. Zhou's appointment that was being discussed. [13:138].

No evidence was presented that indicated that an offer had been made to Mr. Zhou as a postdoctoral fellow. The IAP66 form that was sent to him was for a position as Visiting Scholar [U-79c]. No evidence was presented that any benefits had been promised Mr. Zhou with his employment.

The Panel sustains this charge with respect to the appointment of Mr. Zhou. Ignoring for the moment the existence of the Pallone memo of July 17, 1984, Professor San Filippo was pushing the limits (and arguably well beyond those limits) by appointing Mr. Zhou as a postdoctoral fellow. Professor San Filippo had financial advantage in the savings to his grant by

avoiding the 25% charge for fringe benefits. In addition, the appointment of Mr. Zhou as a postdoctoral fellow, an individual who lacked both a Ph.D. and senior experience, required at a minimum the full disclosure of the circumstances, in writing, and justification as to why an individual with a B.S. in Chemistry and only several years of experience beyond that should be appointed as a postdoctoral fellow. Since this individual was being paid from NSF grant funds, a copy of a letter detailing the unusual circumstances and the approval of this appointment should have been filed with the appropriate Administrative office (such as the Research Contracts Office) so that any question of impropriety in this appointment would be lessened.

Although one might be willing to dismiss the previous argument as a further extension of the borders of the definition of postdoctoral fellow, the Pallone memo of July 17, 1984, [U-3] prevents any such lenience. The Pallone memo is very explicit concerning the title of postdoctoral fellow: the appointee should have a Ph.D. It is clear that Professor San Filippo had knowledge of this memo prior to the assignment of the title of "Postdoctoral Fellow" to Mr. Zhou.

The Faculty Member argued that he cleared the appointment with someone in the Dean's office via a conversation between Ms. Maimone and the Dean's office. Assuming that a conversation described by Ms. Maimone between herself and someone in the Dean's office concerned the appointment of Mr. Zhou as a postdoctoral fellow, there is no evidence that the person in the Dean's office was fully informed as to the questionable nature of Mr. Zhou being labelled a postdoctoral fellow by Professor San Filippo. In addition, there is no evidence that Mr. Zhou had been offered an appointment as a Postdoctoral Fellow prior to his arrival at Rutgers.

5. During the Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4. above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Guozhi, and you had knowledge of the fact and did not make it known when you submitted the letter.

Professor San Filippo testified that in late 1984, Mr. Zhou told him that he was interested in applying to graduate school, for entry in September, 1985. When the subject of letters of recommendation was discussed, Mr. Zhou told Professor San Filippo that he had written to Professor Liu Guozhi while Professor San Filippo was in China in the Fall, 1984, asking him for his permission to apply to graduate school. Mr. Zhou told Professor San Filippo that the letter that Professor San Filippo had recently brought back from China to him contained a letter of recommendation for graduate school from Professor Liu Guozhi. Professor San Filippo said that he had Mr. Zhou translate this letter and that Professor San Filippo smoothed the English and had it typed in his office. Professor San Filippo could not remember why he used Jilin letterhead, but surmised that perhaps the original had Chinese letters at the top. The date on the typed letter [U-37] was 12/20/84, the date on which it was typed. Professor San Filippo asked Mr. Zhou to sign the letter, which he did, in Chinese, and then Professor San Filippo submitted the letter for him [31:37].

Mr. Zhou corroborated Professor San Filippo's testimony. Mr. Zhou said he did not have the original. Mr. Zhou also provided a copy [F-216] of the submitted letter [U-37] with the addition of the following handwritten note on the bottom "I wrote this letter of recommendation in Chinese in Sep. 1984, when Prof. San Filippo visited Jilin University in China. I asked Zhou Peng to translate it and to give Prof. San Filippo" followed by the handwritten signature (also in English) "Liu Guozhi". Mr. Zhou said that in an earlier discussion with Professor San Filippo, Mr. Zhou had offered to

write to Professor Liu Guozhi to try to clear up the question of the existence of an original. However, Mr. Zhou did not keep a copy of the letter that he wrote to Professor Liu Guozhi or the envelope with the alleged response [F-216] from Professor Liu Guozhi.

Assuming that there was an original Chinese version of the letter, we find that Professor San Filippo submitted the letter of recommendation: (a) without attaching the original in Chinese; (b) without indicating that the letter was a translation; (c) without indicating that the translation was done by Mr. Zhou, the student for whom the letter of recommendation was written; (d) without indicating that the Chinese signature on the submitted letter was not written by Professor Liu Guozhi, but was instead written by Mr. Zhou; and (e) without indicating that Professor San Filippo had "smoothed" the English.

The Panel finds insufficient evidence to sustain a charge that there was no original letter of recommendation from Professor Liu Guozhi.This decision was reached independently of the purportedly translated letter of recommendation with the handwritten statement supposedly of Professor Liu Guozhi [F-216]. The Panel notes the sloppiness in which this information was obtained with neither a copy of the letter requesting it from Professor Liu Guozhi nor the envelope purportedly containing Professor Liu Guozhi's response.

The Panel sustains Charge 5.

6. On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in your laboratory.

The Panel sustains this charge. Time report forms were submitted for the three individuals which show that they were paid by Professor San Filippo for work done in January, 1986 [U-56 through U-60]. There was no evidence that this memo had been rescinded during this period. Professor Boikess testified that he did not countermand his directive in his December 16, 1985, memorandum prior to going on leave during the Spring, 1986, term. [4:73]. Professor Potenza testified that Professor San Filippo had told him that Mr. Guo had worked during this period, and that Mr. He and Mr. Zhou told Professor Potenza that they had worked during this period, in Professor San Filippo's laboratory [15:29-31]. There was no evidence that these individuals were formally associated with Professor San Filippo's research group. Professor San Filippo admitted that this charge was substantially true [21:65].

The Faculty Member's responses to the charge included that the prohibitions would be the death of his research program [21:72], and that Professor Boikess' memo was unconstitutional, in violation of the principles of due process and academic freedom, and sections of the AAUP Bargaining Agreement. Because of these concerns, the Panel notes that its findings and recommendations would be unchanged in the absence of Charge 6.

The Panel notes that Professor Boikess had serious allegations of abusive and threatening behavior by Professor San Filippo towards Chinese research workers before him prior to the time that the December 16, 1985, memo was issued. He had consulted with his colleagues on the Policy and Planning

Committee prior to taking this action [14:87]. While the action taken appears to be a very strong action against Professor San Filippo, the Panel does not find that Professor Boikess' action was completely unreasonable given the circumstances. Indeed, not only was further abusive and threatening behavior a real possibility given the allegations, but the Panel found that such behavior continued as evidenced by Professor San Filippo's treatment of Zong Ping Chen on March 31, 1986, (see Finding for Charge 1e above). The Panel deplores the breakdown in communications that had developed between the University and the Faculty Member by the end of 1985.

B. RECOMMENDATIONS

Finding all or parts of Charges 1a, 1c, 1d, 1e, 2, 3b, 4, 5 and 6 true, we next consider "WHETHER THE MATTERS CHARGED AND PROVED CONSTITUTE GROUNDS FOR DISMISSAL UNDER SECTION 3.93."

The Panel finds that Professor San Filippo violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, Professor San Filippo failed in his responsibilities to the University. The Panel concludes that the "matters charged and proved" meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99, as evidenced by his exploitation of and threatening and abusive behavior towards individuals who worked under him in a professional capacity and his lack of integrity in professional dealings.

Given this conclusion the Panel next considers "WHETHER, TAKING INTO CONSIDERATION THE RESPONDENT'S PREVIOUS RECORD AND HIS VALUE TO THE UNIVERSITY, HE SHOULD BE DISMISSED OR OTHERWISE DISCIPLINED."

Professor San Filippo has an excellent record as evidenced by his long list of publications and promotion to the rank of Professor in 1984 [F-60]. He has received over a million dol-

lars in research grants and awards. He has worked with industry to bring together funding for equipment at Rutgers. He is an active research [sic] with an international reputation and a senior member of the Chemistry department. His research accomplishments are an asset to the University's quest for excellence and distinction. There is no doubt that Professor San Filippo has made positive contributions to the University.

However, based on our findings and the evidence presented at the hearings, we find that Professor San Filippo has exploited, threatened and been abusive of individuals who have worked under him in a professional capacity. In addition, we find that Professor San Filippo has demonstrated a serious lack of integrity in his professional dealings. His excellent research record and his contribution to the University are laudatory, and were considered by the Panel in reaching its decision. The Panel unanimously recommends, however, that Professor San Filippo be dismissed from the University.

C. OBSERVATION

Throughout these proceedings, the Panel has felt particular concern for pressures on all of the Chinese scholars that have have been involved in the matter before the Panel. Coming to a foreign land to study can be unsettling enough, but to become embroiled in a dismissal proceeding can do nothing to aid their scholarship or personal well-being, or the reputation of the University. We urge the University to avail itself to the fullest to be supportive of foreign scholars and to be sensitive to the pressures that can be placed on them, both willingly and unwittingly, because of their inexperience with our culture and their dependence on their faculty sponsors and the University as a whole.

Ted H. Szatrowski, Chair

Noel DaCosta

Mary Fetzer

Richard Hixson

David Wilder

APPENDIX H

[LETTERHEAD OF RUTGERS UNIVERSITY]

President

October 1, 1986

Dear Professor San Filippo:

I have reviewed the recommendation of the Executive Vice President and Chief Academic Officer and the accompanying packet of exhibits (numbered 1 through 131) concerning certain actions taken by you. In addition, I have asked Dean Edelstein to seek the advice of the Appointments and Promotion Committee of the Faculty of Arts & Sciences concerning the matters raised in those materials. The A&P Committee's advice and the Dean's transmission of that advice to me are attached hereto and have been numbered as Exhibits 132 and 133 respectively. I have concluded on the basis of the documents specified above that you have violated the basic ethical tenets of our profession, including those standards of professional ethics set forth in University Regulation 3.91, and that, in doing so, you have failed in your responsibilities to this University.

The charges against you concern the following actions which, in my judgment, meet the standards for dismissal set forth in University Regulations 3.93, 3.94, 3.97, and 3.99 and constitute gross neglect of established university obligations appropriate to your appointment and evidence a failure to maintain standards of sound scholarship and competent teaching:

1. Your treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required of all faculty members. More specifically, your treatment with respect to these individuals, as set forth more fully in the attached documents, is as follows:

a. You took advantage of your professional position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

b. You attempted to exploit Ms. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for you.

c. You exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that you would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, you did not provide coverage to either Mr. Gao or Mr. Xiao.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, you threatened and harassed those individuals by repeatedly stating that you would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, you interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. You continued that incident by treating her in an unprofessional, -threatening and abusive manner, within the hearing of other individuals, including her students.

2. On or about July 8, 1985, you directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at your house, to identify himself as

Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

3. You encouraged and permitted individuals working under your direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:

   a. In or about August 1985, Ms. Abbie Lieber, a secretary who works solely under your supervision submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but you told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against your NSF grant, despite the fact that you knew that they had not performed any extra work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

   b. Ms. Marilyn Brownawell, who works directly under your supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though you knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

4. You violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows

Chinese scholars who you knew did not have appropriate credentials and by charging the stipends of such individuals, who did not possess doctoral degrees, to your NSF grant as post-doctoral fellows. Subsequently you supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.

5. During Fall 1985, you submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4. above. One of the letters of reference submitted by you purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Gouzhi, and you had knowledge of that fact and did not make it known when you submitted the letter.

6. On December 16, 1985, Professor Robert Boikess, Chair of your department, specifically instructed you not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with your research group, to work in your laboratory, pending investigation of allegations of exploitation and harassment lodged against you by visiting Chinese scholars. Despite these specific instructions, you subsequently permitted Cong-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in your laboratory.

In my judgment, the conduct described above provides a sufficient basis for your dismissal from the university. You are hereby advised that you are entitled to a hearing with respect to these charges if you request one within two weeks of the date of this letter. If you do not request a hearing within two weeks, I will recommend to the Board of Governors that you be dismissed from the University.

A copy of University Regulations 3.90 through 3.99a is enclosed with this letter. If you have any questions concerning the University's procedures or if you wish to communicate with the University administration in regard to this matter, you may be in touch with Vice President Cole.

Sincerely,

/s/ EDWARD J. BLOUSTEIN
Edward J. Bloustein

Professor Joseph San Filippo
50 Harrison Avenue
Highland Park, New Jersey 08904

Enclosures

cc: Susan A. Cole
T. Alexander Pond

APPENDIX I

[LETTERHEAD OF RUTGERS UNIVERSITY]

Exhibit 132

September 23, 1986

Statement of the FAS Appointments and Promotions Committee for Tenured Faculty

Subcommittee for Mathematics and Natural Sciences

We have examined the materials (Exhibits 1-131) made available to us on the alleged violations of the ethical tenets of Rutgers University committed by Professor Joseph San Filippo. We find that the charges against Professor San Filippo are serious enough, if they are sustained, to justify his dismissal from his position as Professor of Chemistry at Rutgers University. The evidence gathered by the University is sufficient to warrant proceeding according to University Regulations 3.94, 3.97, and 3.98, which provide Professor San Filippo with an opportunity for a hearing at which both sides may present evidence to be evaluated by an impartial panel.

/s/ RICHARD K. LORE Richard K. Lore

/s/ EUGENE R. SPEER Eugene R. Speer

/s/ MICHAEL K. TAUSSIG Michael K. Taussig

APPENDIX J

[LETTERHEAD OF RUTGERS UNIVERSITY]

Executive Vice President
and Chief Academic Officer

9 September 1986

Dr. Edward J. Bloustein
President
Old Queen's Building
Queen's Campus

Dear Ed:

On April 2, 1986, Provost Wheeler conveyed to me the advice of the senior tenured members of the Department of Chemistry, the advice of Dean Edelstein, and his own recommendation concerning certain charges that had been brought against Professor Joseph San Filippo (see Exhibits 59-65). The Provost's judgment, which concurred with that of the department members and the dean, was that the charges were "of sufficient seriousness as to constitute grounds for the dismissal of Professor San Filippo." Accordingly, I asked Vice President Cole to review the materials that had been forwarded to me by the Provost and to conduct whatever other investigation she deemed appropriate.

I have now reviewed with Vice President Cole the matters contained in the attached materials, and I have come to the conclusion that Professor San Filippo has violated the basic ethical tenets of our profession and that in doing so, he has failed in his obligations to this institution.

In particular:

1. Professor San Filippo's treatment of scholars visiting from the People's Republic of China and a Chinese Teaching Assistant violated the standards of professional ethics required of all faculty members. More specifically, his treatment with respect to these individuals, as

set forth more fully in the attached documents, is as follows:

a. He took advantage of his professional position and exploited Mr. Hetian Gao and Mr. Changhe Xiao, both visiting scholars from the People's Republic of China, by directing them or by leading them to believe that they had no choice but to perform domestic work for him, such as garden work and indoor and outdoor cleaning work during the period May through July 1985.

b. He attempted to exploit Ms. Yaru Zang, also a visiting scholar from the People's Republic of China, by attempting to make her perform domestic work for him.

c. He exploited Messrs. Gao and Xiao by representing that they would be provided health benefits coverage and that he would deduct $700.00 from the salary to be paid each of them in order to cover the costs of such benefits. Despite deducting such sums, he did not provide coverage to either Mr. Gao or Mr. Xiao.

d. During the period of time that the above-named visiting Chinese scholars were at Rutgers, he threatened and harassed those individuals by repeatedly stating that he would send them back to China and by directing abusive language toward them.

e. On or about March 31, 1986, he interrupted without sufficient cause a laboratory class being conducted by Teaching Assistant, Zong Ping Chen. He continued that incident by treating her in an unprofessional, threatening and abusive manner, within the hearing of other individuals, including her students.

2. On or about July 8, 1985, Professor San Filippo directed Mr. Changhe Xiao, who had injured himself while doing maintenance work at Professor San Filippo's house, to

identify himself as Mr. Peng Zhou in Middlesex Hospital in order to have Mr. Xiao covered by Mr. Peng Zhou's medical insurance.

3. Professor San Filippo encouraged and permitted individuals working under his direction and supervision to submit false time reports and to make inappropriate charges against certain University accounts. Specifically:

   a. In or about August 1985, Ms. Abbie Lieber, a secretary who works solely under his supervision submitted a time report form, purportedly to compensate Mr. Hetian Gao and Mr. Changhe Xiao for extra computer (and/or library) work supposedly performed by them, but Professor San Filippo told them that the payment was actually to provide them with money to purchase health benefits from the Chinese consulate. Both Messrs. Hetian Gao and Changhe Xiao thereafter received $100.00 each, charged against Professor San Filippo's NSF grant, despite the fact that Professor San Filippo knew that they had not performed any extra work for the money. (Note the previous promise to provide health benefits recited in item 1.c. above.)

   b. Ms. Marilyn Brownawell, who works directly under his supervision, submitted time report forms for the week ending August 17, 1984. She reported and was paid for 40 hours of work for that period, charged against the Chemistry Department's mass spectrometer account, even though Professor San Filippo knew that she did not perform any work related to the mass spectrometer or indeed any compensable work for Rutgers of any kind during that period.

4. Professor San Filippo violated professional and academic standards and exploited foreign visitors to the University by bringing to the University as post-doctoral fellows Chinese scholars who he knew did not have appropriate

credentials and by charging the stipends of such individuals, who did not possess doctoral degrees, to his NSF grant as post-doctoral fellows. Subsequently he supported these individuals for admission to the graduate program in Chemistry, a fact which clearly established that they did not have the credentials to be post-doctoral fellows.

5. During Fall 1985, Professor San Filippo submitted an application for admission to the graduate program, including letters of reference, on behalf of Mr. Peng Zhou, one of the individuals referred to in #4. above. One of the letters of reference submitted by Professor San Filippo purportedly was written and signed by Liu Guozhi. In fact, that letter was not prepared by Liu Gouzhi, and Professor San Filippo had knowledge of that fact and did not make it known when he submitted the letter.

6. On December 16, 1985, Professor Robert Boikess, Chair of Professor San Filippo's department, specifically instructed him not to permit Mr. Peng Zhou, Mr. Con-Yuan Guo, or any other graduate student except those already associated with Professor San Filippo's research group, to work in his laboratory, pending investigation of allegations of exploitation and harassment lodged against Professor San Filippo by visiting Chinese scholars. Despite these specific instructions, Professor San Filippo subsequently permitted Cong-Yuan Guo, Zhen-min He, and Peng Zhou to perform work in his laboratory.

In my judgment, the conduct exhibited in the charges stated above and supported by the exhibits attached to this letter provides a sufficient basis for Professor San Filippo's dismissal from the University, and it is my recommendation that you take the appropriate action to recommend his dismissal to the Board of Governors.

Sincerely,

/s/ T. ALEXANDER POND
T. Alexander Pond

Attachments

cc: Robert S. Boikess
Susan A. Cole
Tilden G. Edelstein
Kenneth W. Wheeler

APPENDIX K

[LETTERHEAD OF RUTGERS UNIVERSITY]

Office of the Provost

April 2, 1986

Dr. T. Alexander Pond
Executive Vice President
Old Queens

Dear Alec:

Dean Edelstein has conveyed formally to me a resolution adopted by the senior tenured faculty of the Department of Chemistry which addresses several serious allegations concerning the conduct of Professor Joseph San Filippo. The Dean had requested that the department render advice on this matter because of the nature and gravity of the charges. The faculty has determined, by an overwhelming vote of thirteen to one, that (1) the allegations are of sufficient gravity that, if sustained, they could be grounds for dismissal; and (2) the allegations were not adequately refuted in the material available for review. The faculty further concluded that the allegations should be addressed formally in the context of the procedure described in *University Regulations* 3.94 *et seq.* which concern recommendations regarding dismissal of a tenured faculty member. The advice which the department has rendered is in accordance with the procedure described within the regulation cited above.

I have read with considerable care the resolution adopted by the faculty and the material upon which the faculty based that resolution. This material consists of a number of documents which contain detailed statements provided by Mr. Hetian Gao, Mr. Changhe Xiao, and Professor Yaru Zang which describe specific instances of intimidation, harassment, exploitation, and fraud, Professor San Filippo's several responses to those allegations, and a letter in support of Professor San Filippo from Nankai University. The material

which I consulted and upon which my recommendation is based is appended.

The allegations brought by Messrs. Gao and Xiao and Professor Zang are indeed grave. The conduct and actions they describe constitute a gross violation of the "Statement of Professional Ethics" contained in *University Regulations* 3.91 and are totally unacceptable in an academic community. They are of sufficient seriousness to constitute grounds for the dismissal of Professor San Filippo. Because of the gravity of the allegations and the potential result, I paid particularly close attention to Professor San Filippo's responses to Dean Edelstein and to his colleagues in the department. In my judgment, which coincides with the judgment of the department, Professor San Filippo, in those responses, does not adequately refute nor rebut the allegations concerning his conduct. Based upon the material which was available to me, I am compelled to conclude that the allegations have sufficient merit to warrant the action which I am recommending. The three individuals who have brought charges against Professor San Filippo appear, on the basis of their statements, highly creditable; and their allegations are detailed, consistent, and seemingly meritorious.

I am therefore recommending to you, after full and thoughtful consideration of the advice provided to me by the department and dean and after careful review of the available evidence, that Professor San Filippo be notified of the charges against him, charges which have been to date inadequately refuted by him and which are sufficiently grave to warrant his dismissal from the University for "gross neglect of established University obligations appropriate to the appointment" as described in *University Regulations* 3.94. We have an obligation to the entire Rutgers community to respond vigorously to these allegations, to determine fully the degree of culpability, and to take appropriate action.

Sincerely,

/s/ KENNETH W. WHEELER
Kenneth W. Wheeler
Provost

KW:S
Enclosures

cc: Susan A. Cole

APPENDIX L

[LETTERHEAD OF RUTGERS UNIVERSITY]

Faculty of Arts and Sciences
Office of the Dean

February 26, 1986

Kenneth W. Wheeler
Provost
18 Bishop Place
College Avenue Campus

Dear Kenneth:

I am forwarding to you the resolution passed by the professors of Chemistry at a meeting held on February 14, 1986, regarding allegations against Professor San Filippo for harassment, exploitation and attempted exploitation, and fraud. The department met at my request and rendered advice on this matter. These allegations are so serious in my judgment that if they are sustained Professor San Filippo should be dismissed from the University.

Enclosed you will find the documents on which the department based its recommendation. They include, among other documents, the results of the meetings I have had with various principles, including Professor San Filippo.

Sincerely yours,

/s/ TILDEN G. EDELSTEIN
Tilden G. Edelstein

TGE:rmd
Enc.

cc: S. Cole

APPENDIX M

RESOLUTION PASSED BY THE PROFESSORS OF CHEMISTRY AT A MEETING HELD ON FEBRUARY 14, 1986

In our view, the allegations against Professor J. San Filippo referred to in the letter of January 6, 1986 from Dean Edelstein to Professor San Filippo and in the supporting documents that accompany the Dean's letter or that have been provided to us by the Chair, if sustained represent serious violations of the statement on Professional Ethics in University Regulation 3.91 and gross neglect of established university and departmental obligations. It appears to us that many of the allegations made in this case are of actions that are inconsistent with and antithetical to membership in an academic community. If these allegations are sustained they could represent grounds for dismissal of Professor San Filippo.

Our examination of the written record of this case and of Professor San Filippo's responses to the allegations has not so far convinced us of the falseness of the allegations. Accordingly we advise you, as Professor San Filippo himself requests in his letter of January 20, 1986, that he "receive a meaningful opportunity to defend [him]self." We advise you to make available to Professor San Filippo the procedure outlined in University Regulations 3.94-3.99a, providing all appropriate due process protections, so that either he can clear himself of these most serious allegations, or should the allegations be sustained, that appropriate action can be taken by the University. Because of the gravity of this situation and its impact on the careers of several people, we urge you proceed in this matter as quickly as possible.

[End of Resolution]

APPENDIX N

[LETTERHEAD OF RUTGERS UNIVERSITY]

Faculty of Arts and Sciences

January 6, 1986

Professor Joseph SanFilippo
Department of Chemistry
Faculty of Arts and Sciences
303 Wright/Rieman Laboratories
Busch Campus

Dear Joe:

We met on November 25, 1985 to discuss certain complaints about your professional conduct. Present at that meeting, in addition to you and me, were Professor Wells Keddie, your AAUP adviser; Professor Robert Boikess, chairman of the Chemistry Department; Professor Joseph Potenza, former department chairman and acting department chairman for this spring semester; and Ms. Kathryn Woods, Assistant to the Dean. At that meeting, you chose not to respond to the specific allegations pending receipt of a written statement from me. This letter constitutes a summary of the complaints made against you. At this time, I am sending it only to you and the acting department chairman. Subsequent to receiving your response and unless your response is satisfactory to me, it is my intention to send a copy of this letter and any response you provide to your departmental colleagues for their consideration and advice.

At a meeting on November 7, 1985, I received complaints from Mr. Hetian Gao, Mr. Changhe Xiao, and Professor Yaru Zang, alleging various acts on your part of harassment, exploitation, and fraud. Specifically, Mr. Gao and Mr. Xiao, both visiting scholars from the People's Republic of China, alleged that you expected them to do domestic work for you, such as garden work, and indoor and outdoor cleaning chores. They claimed that they were not paid by you for this work but

that they did the work because of your repeated threats to send them back to China. They claimed that on these and other occasions you frightened them by making threats and by frequently using abusive language against them. They complained also that you made unannounced visits to their apartment, making them nervous and afraid.

Mr. Xiao stated that he injured his back and chest and cut his arm when a ladder on which he was standing, while working on your porch, slipped and he fell. He stated that this work for you recurred from early May through late July and was neither voluntary nor compensated in any material way. Mr. Xiao claimed that, when he first asked you to take him to the hospital for examination, you "screamed 'No!' " at him. Mr. Xiao stated that, when he continued to complain of back pain, you threatened to send him back to China. You eventually drove him in your car, along with Mr. Peng Zhou, to Middlesex General Hospital. According to Mr. Xiao, although you had promised to provide him with health benefits, in fact you had failed to do so. Thus, Mr. Xiao stated that, at the hospital, you told him not to speak English nor to identify himself correctly because Mr. Peng Zhou would identify Mr. Xiao as Peng Zhou in order to have him covered by Peng Zhou's medical coverage.

Regarding provision of health benefits, in August, 1985, Ms.Abbie Lieber, a secretary who works solely under your supervision, signed time report forms, purportedly to compensate Mr. Gao and Mr. Xiao for extra computer work, but Mr. Gao and Mr. Xiao asserted that, in fact, the purpose of the funds was to obtain $100 extra for each of them to pay for health benefits. Mr. Gao stated that he never did any computing, since he has no knowledge of computers; Mr. Xiao stated that he did computing as part of his regular assignment, not for extra pay. Furthermore, it is our understanding that, in January, 1985, you wrote to Professor Lin Shao-Fan at Nankai University, suggesting that, while you would provide health benefits, you would not do so as part of Mr. Xiao's salary in order to avoid taxation by the IRS. In fact, you did not pro-

vide these promised health benefits and blamed your failure to do so on an alleged change in University policy. In fact, you cut Mr. Xiao's employment from twelve to ten months, thus rendering him ineligible for benefits.

Professor Yaru Zang also made similar allegations against you. She stated that you said to several Chinese, "Now you can go clean my home because I helped you." She also stated that you asked her to cook for you and that, in order to avoid doing so, she had to say that she was not a good cook. As of November 21, 1985, Professor Zang had chosen to stop working for you and to go to another university. She alleged that you threatened, if she did so, to call the Chinese government and consulate to accuse her of acting illegally. She has stated that Nankai University has "decided not to send any more people" to work with you because "Chinese people were so ill-treated by [you]." Professor Zang complained, as did Mr. Gao and Mr. Xiao, that you have used "threats and deceitful measures" to keep people working for you. Further, we have been told by Mr. Gao that Chinese students and scholars have sought to avoid working under your direction once they arrive here and learn about your alleged harassment of them.

In addition to the complaints made by the Chinese scholars, I have become aware of your apparent misrepresentation of the scholarly status of Mr. Peng Zhou. Further, you have failed to cooperate with the department chair in his attempt to clarify the status of Mr. Cui Qing.

Pending investigation of the grave allegations against you by the Chinese visitors, I asked Professor Boikess to reassign Mr. Gao and Mr. Xiao to other Chemistry Department research groups. For the same reason, he has also decided not to assign any Chinese graduate students to your research group until the satisfactory resolution of these matters.

In summary, the complaints of exploitation, harassment, and fraud made against you by the Chinese scholars, if true, would represent a gross violation of the statement of professional ethics set forth in *University Regulations* 3.91. The fol-

lowing documents which are attached to this letter contain more detail concerning the complaints:

1. Letter dated October 27, 1985 from Mr. Changhe Xiao.
2. Letter dated November 11, 1985 from Mr. Hetian Gao and Mr. Changhe Xiao; copies of time reports attached.
3. Letter dated November 21, 1985 from Professor Yaru Zang to Professor Robert Boikess.
4. Translation of letter dated November 23, 1985 from Professor Yaru Zang.
5. Translation of letter dated December 5, 1985 from Mr. Hetian Gao.
6. Translation of letter dated December 5, 1985 from Mr. Changhe Xiao.
7. Letter dated January 16, 1985 from you to Professor Lin Shao-Fan, Nankai University.
8. Memorandum dated January 31, 1985 from Professor Boikess to you.
9. Memorandum dated February 8, 1985 from Professor Boikess to you.
10. Memorandum dated March 6, 1985 from Assistant Dean Karen Stubaus to you.
11. Copy of Mr. Peng Zhou's Graduate Admissions Personal Statement Form dated December 14, 1984.
12. Letter from Liu Guozhi, Associate Professor at Jilin University, to the Graduate Admissions Office dated December 20, 1984.

Please provide me with your written response to the matters raised in this letter no later than January 20, 1986. If I do not receive your response by that date, it is my present intention

to forward a copy of this letter to your departmental colleagues for their consideration and advice.

Sincerely,

/s/ TILDEN G. EDELSTEIN
Tilden G. Edelstein

TGE/dmg

Attachments

cc: Joseph Potenza w/Attachments

bcc: Susan A. Cole w/Attachments
Elizabeth Mitchell
John J. Peraino, Carpenter, Bennett & Morrissey
w/Attachments

APPENDIX O

Regarding my experience and feelings about the period of work in Professor J. San Filippo's laboratory.

During the period of September 1984 when Professor San Filippo came to China to visit several key universities (those ranked among the first ten in the entire country) which are directly under the Ministry of Education of the Chinese government, he came to Jilin University. In the beginning of September, as soon as he arrived at Jilin University he told Mr. Li Ming-yang (who worked in Professor San Filippo's laboratory for one and a half years in 1981-1982) and Professor Huang Hua-min (Vice-Chairman of the Chemistry Department and Head of the Organic Chemistry Research and Teaching Division) "I have a lot of money. I hope you can send two people to my laboratory to work. I can offer all financial support." At the time I had already passed the government's examination for going abroad and was waiting for the issuance of a plan for study abroad from the government and making preparations for going abroad to study for the Ph.D. degree. After San Filippo made his offer, the Chemistry Department decided to send me first to San Filippo's laboratory to work for one year and then try to find the financial support to complete my plan for obtaining a degree in the United States. In discussing this matter, San Filippo suggested that it would be better for me to work for two years in his laboratory. At the time, Professor Huang Hua-min did not agree since he considered that it was very important for me to study for a degree after working for one year. In discussing the matter of salary, San Filippo said that he would make the decision after his return to the United States based on his estimate of his scientific research funds, and then would write to us for further discussion. However, he never wrote explaining this matter. In February this year (1985) San Filippo sent a letter to Mr. Li Ming-yang and enclosed an IAP-66 form for me. It was from this form that we then knew he would give me only $7,300 as a salary for one year. I considered this too little, but

Mr. Li Ming-yang said that when he worked in San Filippo's laboratory he got only a little bit more than $5,000 for a year. Later on, after some deliberation, we felt that since the matter had already been agreed upon, we should keep the promise. Even though the salary was small, to acquire new knowledge was important. Thus, I had to hurry within the limited time to fulfill all the requirements for going abroad, and at the same time check and look for materials because San Filippo had already sent me the experiment topic he would ask me to do together with the IAP-66 form. I spent a lot of time looking up relevant materials in books and journals, decided on the experiment plans, and made sufficient preparation.

During the period of time when San Filippo was in China, both Mr. Li Ming-yang and I acted as host to him. At the time, his appearance, talk, and conduct seemed to be very much like a gentleman. But after I came to the United States, I never thought he could turn out to be such a cruel and heartless person with a mouth full of lies. As soon as I arrived at this place, without taking any rest, I immediately went to see him. After several words of our meeting, he began to question me about the preparation for the experiment in the laboratory. I talked about the proposal I had already made and showed him some of the important materials, as well as my ideas and plans, and he was somehow satisfied. Then, he asked me whether I would be able to succeed in this experiment, and I said, "Even though I do not have too much experience in experiments, I would certainly do my very best to succeed in this experiment, and I believe I can do it well." At this time his face turned color and he loudly shouted and yelled "if you cannot do this job well, I will send you back to China immediately!" Afterwards, he led me to his laboratory, assigned me a laboratory bench, gave me a key, and asked me to begin the experiment work. At the moment I felt very wronged and unfairly treated. I did not make any mistakes, but during our first meeting he treated me in this manner. This was indeed an insult to a person's dignity. More than a month later, when

Mr. Xiao Chang-he came to work here, again at their first meeting San Filippo flew into a rage and showed his authority. I then realized that he would deceive Chinese people to come to his place, and at their first meeting he would demonstrate his power and authority as if he would rap you on the head with a stick to let you have a taste of his madness and his inhumanity. Once when he succeeded in threatening and intimidating you, he could then manipulate, take advantage of, and exploit you as he wished.

All those students and visiting scholars from China who have worked and studied at Rutgers before have all heard about San Filippo. In spite of the fact that many of them do not know him personally, they all know what he has done and they all know that he takes advantage of and exploits Chinese people. When I first arrived at this place, not only the Chinese people here told me, but also some American students and students from other countries, that San Filippo was a bad person. He had visited China twice, and is relatively knowledgeable about some of the general situations in China. He took advantage of the fact that China just began to open up, and did not have a clear understanding of situations in the outside world, and that when Chinese first arrived in the United States they did not quite understand the environment and the American society and laws. And he used threats and deceitful and exploitive measures towards Chinese scholars who came to work in this place. He treated the Chinese scholars working here as slaves. Whenever the matter does not quite suit him, he would get into a rage, shouting and scolding loudly, and always threaten: "I will send you back to your country!" or "I will write to your University and say that you are not doing your work very well here," and so on and so forth. He utilized various kinds of mean measures and manipulation to press and threaten Chinese scholars and students to do more work for him. They not only couldn't leave the laboratory in the daytime, they had to continue to work at night as well as weekends in the laboratory. Weekends and holidays he frequently

asked the Chinese people to go to his house to do housework for him, and never gave them any compensation.

During the second weekend after I had just arrived at Rutgers, San Filippo asked Zhou Peng to tell us to go to his house to do work on Saturday. Those who went to his house included Professor Xie Qing-lan from Nankai University who was also working in San Filippo's laboratory. Professor Xie was about to leave for China in a few days, but San Filippo still asked him to go. He asked us to do yard work, dig up flowers and small trees and then plant large pine trees. [we were told] to remove the original flowers and grass, then use a shovel to till the soil, apply fertilizer, and then plant new flowers. He treated us as coolies. One job finished, he gave us another job. From 9:00 a.m. to 5:00 p.m. he only offered us a noon lunch. We worked a whole day. Professor Xie is more than 50 years old and his white hair was all soaked with sweat. Not to mention that a person of that age cannot endure this kind of work, even young and strong people like us also felt extremely tired and exhausted. At the time I felt that San Filippo was really a heartless person.

In the two months from May to July 4, San Filippo asked us to do his housework five or six times. Since the occurence of the incident when Mr. Xiao Chang-he fell down and injured his back in his (San Filippo's) house on July 4, he no longer dared ask us to go to his house to do housework. Every time he would ask Zhou Peng to tell us to go to his house to do housework. Either on Saturday or Sunday morning he would drive his car to come to our dormitory between 8:30 and 9:00 a.m. and take us to his house to work. Once we arrived at his house, he would immediately take out the already arranged work schedule, and then assign each of us to do various kinds of jobs. He would arrange one job after another. [We worked] under the hot sun and our sweat poured down all our bodies. But he himself did not do anything. He would either stand under the shade of the trees or inside the house, eat and drink, and give out orders, like guards watching prisoners working. Every time he would only supply

lunch at noon. We had to work past 5:00 p.m. and then he took us home. Once we returned to our dormitory, we felt both tired and hungry and did not wish to move. What was most hateful was once on a Friday afternoon he again fell into a great rage towards me, shouting and scolding; but as he was walking out of the laboratory he immediately asked Zhou Peng to tell me to come to his house to do work on Saturday. I felt extremely indignant. He treated us so cruely. He treated us as slaves whom he bought at a cheap price. This was indeed no longer bearable!

Ordinarily for no reason he would find an excuse to vent his anger or his frustration on us which might have been caused elsewhere. If we refused to do his household work, he would become extremely displeased. From the very beginning he considered that Mr. Xiao and I were not as obedient as those Chinese who had worked in his place before. Every day he therefore found all kinds of excuses to fly into a rage, shouting and yelling. The words from his mouth [his language] were those dirty words which would nauseate people. Those foul words other people would be ashamed to repeat. After hearing these words, we really felt ashamed for him. His behavior and talk have indeed disgraced the honorable title of professor. In view of this kind of situation, I really wanted to return to my country and not work in his place. But if I just return under these circumstances, I would have difficulty in explaining the reasons [for my return to my University.] Moreover, San Filippo could also write to our University and accuse me of not doing my work well here. Every day I longed to leave his laboratory sooner, and never wanted to see this greedy, cruel and inhumane person.

I came here to work on April 24. When I received my paycheck, I noticed that my salary for the entire year would be paid out over the period up to February 28, 1986. At the beginning I didn't know why it was so. Later on Zhou Peng told Mr. Xiao and me: "San Filippo asked me to tell you that he gave you the entire salary for the year over 10 months because he has encountered some difficulties in reporting his

expenditures. But he still wants you to work for 12 months." At that time we felt that San Filippo was again playing some kind of tricks, but we again did not know the background of this matter. Only until very recently did we know that he played a trick, deceiving the people above and cheating the people below, for the purpose of not buying medical insurance for us.

Regarding our medical insurance, not until the occurence of the incident when Mr. Xiao fell down and injured his back and we asked him (San Filippo) to take Mr. Xiao to the hospital did he say: "You two have no medical insurance." We said: "You are responsible for purchasing medical insurance for us. Before we came, you said you would give us a salary of $8,000, but you had to deduct $700 for our medical insurance. Besides, you said that in this way you could let us pay less tax. Since you have already deducted $700, why didn't you buy medical insurance for us? We are far away from our native place and country, and medical expenses in the United States are so high. The salary you gave us is so low. If we get sick or something happens, what should we do?" He then became very evasive and opened his mouth to tell lies: "Beginning February this year our University changed regulations. We no longer purchase medical insurance for visiting scholars like you." We did not know any relevant regulations, but we did not believe his false words either. We said that you should have told us before so that we could find some other ways to buy medical insurance. Another Chinese student who was present said that the Chinese Embassy in the United States has sponsored a cooperative medical insurance for Chinese students and visiting scholars. San Filippo immediately asked how much it would cost for a month. This student said it would cost only $20 a month. San Filippo immediately pretended to be very generous saying: "You two can go to your Consulate General's office to buy medical insurance. I will pay for you." By the beginning of August, not very long after this conversation, San Filippo asked Zhou Peng to call me to his office, and asked me if I had purchased medical insurance

from the Chinese Consulate General's office. I said I had not, and he immediately became enraged and questioned me why I hadn't. I said I had to find out how to purchase such medical insurance, what procedure would be required, and how to make the payment before I could do it. At that time Zhou Peng who was present said: "San Filippo said that he had asked you to pay for the medical insurance yourself, and then he would reimburse you." In fact, I had never heard anyone tell me so. We had been waiting for San Filippo to write a check for us and then go to the Consulate General's office to purchase the medical insurance. But now he blamed us for the mistake. At that time, because he felt guilty and was afraid that any delay in time would expose his crafty schemes, he pressed us to buy the medical insurance immediately. He shouted and yelled loudly, "Here it is not China. Here I am your boss. Whatever I say you should do immediately. Now you two can take the time off and go to buy the medical insurance immediately! I am afraid now it is too late to buy the medical insurance! Oh, too late!" Right after this he used such foul language which really cannot be repeated. Furthermore, he shamelessly said: "You are working in my place. I am totally responsible for you. Do you understand?"

Thus, we each paid $100 to the Chinese Consulate office in New York City, and bought medical insurance for five months from August to December. In our pay check of August 23, he gave us each an extra payment of $100. This amount of money was reimbursement for what we paid for the medical insurance to the Consulate General's office. Later on it was discovered in San Filippo's expenditure report that he had lied and claimed that we did a part time job on computation from July 22 to August 2, and for this reason he gave us extra compensation of $100. In fact, I did not know how to use a computer at all. Here at Rutgers I have never touched a computer. Furthermore, during the period from July 22 to August 2, Mr. Xiao was lying on the floor to rest because of the back injury from falling while doing housework in [San Filippo's] house, and he could not walk outside the room. Mr. Xiao indeed did some part time

work on the computer for him, but that happened on a night in the last part of September. He (San Filippo) went to his dormitory and asked Mr. Xiao to do some computer work for him, but he never gave him any compensation.

Since I arrived to work in his laboratory, he has always been shouting and yelling, pressing me for experiment results. His real purpose was to ask me to stay in the laboratory to work at night and also weekends. Yet he could not openly say that. Therefore he always shouted and cursed, using all kinds of excuses to press me to spend more time to do more work. When I first arrived, I went to work right away in the laboratory. Because of the time difference of 12 hours between here and China, I had not quite adjusted to the time difference, and I also needed some time to recover my strength. But, because of his exertion of pressure and threats, and my unfamiliarity with the environment, plus the fact that I had to be extremely careful not knowing when he would come to the laboratory yelling and shouting, I became very nervous and suffered frequent insomnia. However, in order to produce results from the experiments, I frequently stayed in the laboratory continuously working for eight, nine hours, and sometimes even more than 12 hours, without any rest or even eating in between. Every morning I entered the laboratory at 8:30 and left at 11:00 or 12:00 at night. In between I only went back to my dormitory for one or two meals. After this long period of exhausting work, even though I was in good health before I came, I lost a great deal of physical strength and I began to have stomach pains. Once a little bit hungry, the pain did not stop. Especially every day by 4:00 or 5:00 p.m. the pain would continue without a stop. Before I came, I never had any stomach problems. After a long period of adjustment in my diet, the situation improved slightly. Even now, if I become hungry, I still feel a stomach ache. All this was caused by San Filippo's purposeful threats and exertion of pressure. He frequently threatened us: "Send you back to your country!" "I will write to your University!", etc.

In the laboratory there were many hazardous and poisonous chemicals, and the management of those materials was very unsatisfactory. Mercury could be seen every place, but he (San Filippo) was indifferent. Except when people didn't do the experiment well and the smell reached his office, he would immediately come out shouting and yelling. Even though he fully understood our environment, he did not care about our life and death as long as we were doing an experiment in the laboratory. Sometimes when he came to the laboratory to check on us if we were doing the experiment, he himself would cover his nose to walk around quickly and then leave immediately. Most of the time he would watch us through the glass window and see if we were in the laboratory. As soon as he found that we were not in the laboratory, he would persistently question where we went and what we did. He treated us simply as prisoners.

Shortly after I arrived I injured my thumb while doing an experiment, and it later became infected and filled with pus. It became swollen and enlarged and extremely painful. He (San Filippo) already saw that, but he still pressed me to do chemical experiments. Because my thumb became swollen and enlarged, I could no longer wear the rubber gloves. So I went downstairs to the stock room to get a larger size rubber gloves. Mr. Jim saw it and was very surprised. He became very concerned and suggested that I should go to see a doctor immediately. I said that I did not have medical insurance. He said that he would call and tell San Filippo. I told him not to make the call because San Filippo had already known. Mr. Jim again telephoned Ms. Maryland and asked her to come to the stockroom. Ms. Maryland told me that I had better go to see a doctor. I said I could not go because I did not have medical insurance. She suggested that I should soak my hand every day in hot water three or four times for 20 minutes, which could speed circulation of the blood. I followed her suggestion. After more than a week, the thumb became healed and a layer of skin peeled off. Even this way, I continued to do chemical experiments in the laboratory.

After Mr. Xiao fell down and injured his back doing housework in his (San Filippo's) house, he took Mr. Xiao back to the dormitory and then just left without doing anything. When [we] called him and asked him to take Mr. Xiao to the hospital, he refused. By the morning of the fourth day, Mr. Xiao could no longer bear the pain. He consequently wrote a note asking San Filippo to take him to the hospital, and asked me to bring it to San Filippo. He (San Filippo) was on the phone in his office. As soon as he saw this note he immediately hung up the phone; his color suddenly changed, and he became greatly angry. He ripped the note into pieces and threw them into the air, shouting: "I said I could not do anything more for him! To go to the hospital would cost a lot of money. If he just rests for a while, he would get better. Since he insists on going to the hospital, I will immediately send him back to China!" Again he shouted and yelled at me and kicked me out of his office. At that time I became exceedingly angry. The way he treated us was indeed inhumane. He had lost even the minimum human decency and yet still shamelessly pretended to appear like a noble, refined professor in China!

Mr. Xiao was still lying on the floor in the dormitory. (Because of his back injury, he could not lie on the bed. Every day he had to lie on the floor to take a rest.) San Filippo went to his dormitory and pressed him to go to the laboratory to work. Mr. Xiao could not sit for very long in the computer room, so he went to the Chemistry Department library and lay on the floor to do computer programming work for him. Upon observing this scene, all the Chinese visiting scholars and students felt extremely angry and they all said San Filippo, this person, was indeed too cruel and took too much advantage of Chinese visiting scholars.

San Filippo thought that there was still much he could squeeze out of Chinese people. Chinese visiting scholars are diligent, willing to do work, and are employed at a cheap price. Every one of them can do two or three people's work (because they have to continue to do experiments at night and weekends, and furthermore can be asked to go to his house to

do his household work.) [He felt he] could take advantage of them at his will, and not give them normal treatment. Because he wanted to keep having Chinese people working in his place continuously, he paid great attention to cultivating relations with well known professors and universities in China. He would pursue any avenue and any menas [sic] if he had the opportunity to do so. His aim is to continuously get Chinese scholars and students to come to do work for him through deceptive means Even though he mistreated these people, they did not dare tell the truth after their return, and did not dare to expose San Filippo's true nature. Thus, he (San Filippo) felt he could threaten and take advantage of Chinese visiting scholars and students without any restraint and inhibition. He frequently used such words as "send you back to your country," "write to your University," etc., to threaten Chinese visiting scholars and students.

When President Tang Ao-qing of our University led the Jilin delegation to visit Rutgers in the beginning of September this year, he led President Tang to walk upstairs and downstairs to tour his laboratory. He boasted that he had such and such advanced instruments, that he had a lot of money to do scientific research, that there were many Chinese in his group, and that he was concerned about and liked them. When President Tang talked with me about my work, he pointed to me saying, "I like him very much!" It seemed that he completely changed and assumed a different face. His hypocritical manner indeed nauseated people. He again asked us to his office to take a picture together with President Tang, and said to President Tang, "I hope I can meet you again at Jilin University in the future!" He treated Chinese scholars in such an inhumane way and still constantly did not forget to go to China. His purpose was simply to go there to practice cheating.

Anything concerning conditions of Chinese people which he considered useful to him, he would try to collect. For example, in August this year Wang Chun-xin of the Chinese Science and Technology University came to work in Professor R. Levy's laboratory. When Wang just arrived, he (San

Filippo) asked Wang all kinds of things and asked how much his salary was. Wang said that his salary was $15,000 for one year. He immediately asked Wang Chun-xin to give him his IAP-66 form and took it to his office and made a copy to keep. I guess he was again collecting reference material for future practice of cheating.

Even though at Rutgers San Filippo's behavior was already well known to many people, some of the Chinese Universities which have relations with him still do not quite know his behavior. I sincerely hope that Rutgers University will write to Jilin University and Nankai University explaining what San Filippo has done and our situation and our working conditions in his laboratory so as to enable these Universities to really know his true nature. Besides, we had thought that after our resignation San Filippo could write to the authorities of Jilin University and Nankai University or relevant professors to implicate us and confuse right and wrong and turn upside down what is black and what is white. Therefore, we think there is a need for Rutgers University to testify to our work and conduct.

Here I would like to greatly thank the President of Rutgers University, the Dean of the Faculty of Arts and Sciences, the Chairman of the Chemistry Department, and some other professors for the concern and help you have shown. After San Filippo's gravely improper behavior was discovered, you showed us such concern and attention which we did not anticipate at the beginning. For us you have upheld rightousness and stood for the principle of fairness and to us you have extended your warm and friendly hands which made us, for the first time after arriving on American soil, deeply realize that American people are very friendly, ardently loving democracy and equality, pursuing truth, upholding justice, and indeed possessed of the spirit of good humanitarianism. With such enlightened and sagacious people as you to administer Rutgers University, I feel that to be able to remain at Rutgers to work and study is fortunate and honorable. San Filippo is an exception. [We should not] let what he did cause

Rutgers University to suffer disgrace and shame. [We] should not let such an individual cause damage to the image of American people. We will testify all this to all Chinese visiting scholars and students, all the universities in China, and the Chinese people. Your noble conduct and your names will forever be engraved in my mind.

Hetian Gao

December 5, 1985

APPENDIX P

My experience and feelings in Joseph San Filippo's group.

Long before I came to Rutgers as a visiting investigator several faculty members of Nankai University who had worked in Professor San Filippo's group had already told me that Professor San Filippo has a bad temper and gets easily agitated and that I must be careful while working there. I thought that as far as temperament goes I could keep harmonious relations with almost all people. And I thought that this should not be a problem.

I had learned from those who returned to China that medical insurance was very important while working in the United States. Professor Lin Shao-fan, who recommended me to come to Rutgers to work, was keenly aware of this matter. In his correspondences with Professor San Filippo, Professor Lin Shao-fan explained this matter well. In Professor San Filippo's reply to Professor Lin Shao-fan, he clearly mentioned the matter of medical insurance, and he would deduct seven hundred dollars ($700) from my salary for the expenses of medical insurance. (I still have this letter even today.) I arrived in New York on June 5 of this year, and came to Rutgers on June 6. I did not know what I should do after arriving at the school since Professor San Filippo had not given me any relevant information nor told me any procedure that I had to complete. Nor had anyone else told me anything. In less than an hour after my arrival at Rutgers and having barely finished a meal, I immediately went to see Professor San Filippo. He merely told me where the computer was housed, and what kind of work I should do. He did not mention anything else at all. I assumed that the matter of medical insurance must have been taken care of long ago. Therefore I did not ask and went to work in the terminal room right away.

On June 10 Zhou Peng told me that Professor San Filippo wanted to see me. I went to his office. As soon as I entered his office, he asked me what I had been doing. I said "I have been reading the material you sent me." He then questioned why I did not go to the terminal room to compute the prob-

lems that he had given me. [I said] that I needed to finish reading these materials and to get to know how to use the computer here before I could begin the computing. Then he flew into a rage: "Why didn't you finish reading the material that I had sent you in China before you came here? I think you don't know computers at all." At that moment I became very dumbfounded. I had been here only for three days, [and I said to myself] "how do you know that I don't know computers and that I cannot compute the problem? You cannot really expect me to finish all the work in one day." Then I said to Professor San Filippo "No, when I was in China I had my assigned work in China to do. Furthermore, different computers have different commands. I must get familiar with the computer before I can begin computing a problem." Professor San Filippo said, "different computers have different commands? Give me an example." After I explained to him, he was still sceptical. He went to look for the computer expert Paul Weiner downstairs. After having heard his explanation of the relevant facts, he dropped the matter.

When I just arrived at Rutgers University, I had great enthusiasm for my work. I went on duty from morning and off duty in the evening. Except for taking time for lunch, I stayed continuously either in the Chemistry Department library or in the terminal room. (I never had office space. San Filippo asked me to study in the library.) Not only working during the regular hours, I also continued to study or ran a program on a computer after supper. San Filippo not only checked on my work during the daytime, but also in the evening. Sometimes even after 10:00 o'clock at night he came to check on my work asking about the progress of my work and urging me to work faster.

At the beginning of August I dragged myself back to work. I was in a weakened condition, and endured the torture of the pain of my back injury. At that time I could not continuously sit for more than an hour, and I had to lie down to rest. Since I did not have an office, and of course no bed, I had to lie down on the floor when I felt tired. After resting for a while, I would get up again to study reference material or to compute problems on the computer. Sometimes when there were

few people in the library, I put several chairs together and lay down to rest. Even when I was in this kind of condition, he [San Filippo] still incessantly asked about my work, and pressed me to speed up the progress of the work, and showed no concern for my injury and pain. Not to mention that he doesn't have the minimum human decency, what was worse was that the heartless San Filippo said to Zhou Peng in September of this year, "I have suffered much loss by asking Mr. Gao and Mr. Xiao to come to work here. I have given them that much salary, but they haven't done very much work." Zhou Peng told Professor Zang [Ya-ru] what San Filippo had said. "What loss has he suffered?" It was simply that we no longer do gardening work, wash and clean stairs, attics, for his house! We are visiting scholars at Rutgers University, and we are not cleaning men for San Filippo's house!

When I first came to Rutgers, San Filippo told me that he had finished calculating a problem in two days. But when he took me to VAX-11/750 and asked me to see the programming, he didn't even know the Logon Command. With the assistance of a certain man who was present, he finally learned how to use the computer. Later on Mr. Paul Weiner told me that that problem was calculated by him. This was the first time in less than a week after my arrival at Rutgers that I heard him [San Filippo] telling lies.

One of the assignments he [San Filippo] gave me was to use a program developed by someone to compute the isotopic effect. But the explanation for the program was not sufficiently clear, and further I could not find the reference to this program in current literature. I then asked San Filippo if I could go to see and consult the person who wrote the program, and clarify several questions. This I felt was a very effective and economic measure. San Filippo said loudly: "Here is not China. [Our] country will not give me money to go out to learn." "You may make a phone call." I said that some of the molecular models could not be explained clearly over the phone, but he insisted on not letting me write directly to the person who developed the program for pertinent information. On June 16, he agreed to make the call to ask the

question, but he continued put it off and not make the call. He didn't make the call on June 18, he still didn't make the call on June 20; he either said that he was busy today or said that [we] wait for a few more days. I emphasized that if this problem could not get clarified, we could not proceed with the work. Even so, he continued to put it off, and by July 4, he still did not make the call. On August 10, at my repeated urging he finally agreed to make the call. But San Filippo said to me, "to make a phone call is very expensive here. You should put all your questions together and ask them at once. And don't waste my money! " When he made the call, he read to the other party the questions that I had already written down, and then listened to the other party's explanation. There were a lot of explanations which were not easy to understand. He [San Filippo] could not quite comprehend [the explanation]. I told him he had better use the recorder to record the conversation, and he then loudly blamed me why I did not tell him earlier. After putting down the receiver, San Filippo said that these questions could not be clearly explained over the phone, and he asked me if I could understand all the explanations. Since "you were the one who had the receiver, I merely overheard a few words and a few sentences near the receiver." Nevertheless, based on the figures drawn during their conversation, I finally resolved a very important question. Now I understand the reason why he delayed and did not want to make the phone call. This is San Filippo's own account: "As to these problems, if I don't understand them, you should understand. Why should I hire you and give you a salary? The reason I gave you a salary is to ask you to do it, not for me to do it!"

In order to increase the efficiency of our work, after my health became slightly improved, I took the initiative and suggested to San Filippo that we could do two programs at the same time. In this way if one program became bogged down because of certain problems, the entire work would not be held up. He agreed. The fact proved that this suggestion was very effective. When we finished a relatively simple task at the same time we could also solve the problem of relatively

difficult programming. In spite of my suggestion to increase the efficiency of work and my working intensely every day, San Filippo was still not satisfied. One day in the middle of October he asked me when the result of a certain program could be obtained. I told him: "I am doing my very best." When he heard that there was no assurance for a definite date, he became greatly angry: "You are wasting my time and wasting my money. If by the end of this year you still cannot finish the project, I will send you back to China." "You have been here for six or seven months. What have you been doing all those days?" The fact is that the day when he said all this, I had been at Rutgers for only four and a half months. He also frequently asked, "What time do you come on duty? What time are you off duty? What are you doing every day? What is the progress of your work?" To put it frankly, it was simply that he didn't trust us. His shouting and yelling, constantly checking on my work: all this was simply for him to employ all possible means—checking, questioning, threatening, frightening, to make us work harder for him at the price of my life, and to "squeeze more oil from the buckwheat." He used plausible pretense of checking to achieve the goal of driving us as his slaves. In his mind a day should have 36 hours, and we should work for 24 hours, and then he will be satisfied. Isn't it so? In four and a half months I had to finish six or seven months work in his mind. Even today I still carry the back injury solely caused by San Filippo, and work all day like a normal person. As far as my work is concerned, I really have no qualms with my conscience.

Because of my back injury from falling, I utterly could not continue to work for a long time. Furthermore, I could not go to the laboratory at night. One day in the middle of September San Filippo saw me, and told me to go to see Zhou Peng for a new assignment. I found Zhou Peng, and he told me that San Filippo wanted me to rewrite a program for the computer used for the mass spectrometer, but I could not do it during the daytime working hours. I had to do it at night. San Filippo pressed me several times and asked me to tackle the problem diligently. Later on, after consulting some relevant material,

we had to abandon the plan because the original program was based on machine language and there was no way to compile a unified program. But when I reported this to him, I had hardly even finished a sentence, he opened his eyes widely and shouted loudly: "don't waste my time." May I ask if I did not report this to him, then what would he do to me? For my extra time of work, not only I did not receive from him any compensation, I had to take his unreasonable yelling and shouting. What kind of reason in the world is this?

One night he drove his car to my dormitory, and asked Professor Zang [Ya-ru] and me to spend the night to draw some figures of the results of the experiments. And he asked us to hand in the figures the next morning. We continued to draw until past 12 midnight. The next day when I handed him the figures, he didn't say anything. One day at noon time we continuously tried some programming until 1:30 in the afternoon, and then I returned to my dormitory for lunch. No sooner had I entered the terminal room, than I heard someone saying that San Filippo had been looking for me and asked me to go to see him. I went to see him. He asked me where I had been and what I was working on. He questioned me in great detail as if I cheated in my working hours.

As for the issue of salary and medical insurance, it has remained a mystery since the first day I arrived.

On June 6, the day I arrived at Rutgers, that night when we went to Pathmark shopping, Zhou Peng said to Mr. Gao and me: "San Filippo wants to give out your salary for 12 months over 10 months, because he has encountered some difficulties in submitting his budget report. But you still have to work for him for 12 months." Both Mr. Gao and I could not quite understand this matter; we felt there must be something tricky, and yet did not comprehend the reason behind all of this. In filling out the payroll form, it was stated that my salary would cover the period from June 10, 1985 to March 31, 1986. Now I realize that in so doing he [San Filippo] could save the expenses for [our medical] insurance. Since he had already deducted $700 from our meagre salary, he still wanted to sequester this $700 and tried to find a reasonable

excuse to do so. He really has exhausted his brain [to do all this].

On July 3, Zhou Peng told Mr. Gao and me that San Filippo wanted several of us to go to his house to do house work. I had been at Rutgers for less than a month, and was unfamiliar with the situation and condition here. Even though I was very unwilling, I reluctantly agreed to go. To tell the truth, at that time I was extremely apprehensive; if I refused to go who would know what San Filippo would do to me.

About 8:30 in the morning of July 4, San Filippo drove his car to Nichols apartments. Zhou Peng, Mr. Gao,and I, the three of us, successively got into his car. San Filippo drove his car to the rear of a building of Johnson apartments. He parked his car and secretively took two huge round-shaped rocks from the stairs near the bottom of the wall, and carried them back to his car, saying that he would use them to fix his garden. When he got inside the car, San Filippo said "If this had been seen by a news reporter, it would become news. Professor of Chemistry steals rocks. Rutgers thief! Rutgers thief!" I couldn't believe that he could be so brazen-faced. Not only did he steal University property in broad daylight, but also shamelessly boasted and rejoiced at the success of his stealing.

We arrived at his house. No sooner had we recovered our breath after getting out of the car, than San Filippo showed us the work schedule that he had already prepared for each of us: repairing the garden, cutting the grass, tilling the soil, applying fertilizer, etc. I was assigned to wash and clean his doors, windows, porch, and so forth.

After having cleaned the doors and the windows, while I was standing on a thin aluminum ladder to clean the horizontal beam of the front porch, the ladder suddenly slipped along the pillar of the porch. When the ladder slipped down along the pillar, my two arms were cut. The left arm had a rather deep wound and the blood dripped down. The inner sides of my two arms had huge patches of bruises, which still have distinct scars. What was worse was that when the ladder fell down my feet were still on the rung of the ladder and my

chest struck heavily against the rear part of the floor of the porch, and my entire body folded like the letter V with my spine up, and I then again fell heavily to the ground. My two legs knelt on the ground, and I could not move and I couldn't say anything. There was a ringing in my head and unbearable back pain. In fact, at that time I was almost immobilized and had difficulty speaking.

When I fell down from the ladder, Mr. Gao heard the sounds of the fall. He put down his work immediately and rushed to the porch to help me get up. Only at this time did San Filippo come out, still chewing chicken and holding a chicken drumstick in one hand. Zhou Peng and San Filippo supported me to lie down on the sofa. San Filippo said "Xiao was frightened. Don't do anymore work." "[His] spine is not broken." He poured a cup of a cold drink for me, and then left me and continued to ask Zhou Peng and Mr. Gao to work until past 12 noon. I stayed inside the house for more than an hour and only then did San Filippo drive me back to my dormitory. Zhou Peng had to use a lot of strength to help me walk up to my bedroom on the third floor.

I slept numbly all afternoon and all night. Except for taking a few bites of rice, I lay in bed without making a move. Headache, dizzyness, and the feeling that my entire body was collapsing, plus the unbearable back pain, all invaded me. In my dream I saw San Filippo holding a big stick towards me and fiercely striking my back, and the pain was so severe that I just rolled on the ground. When I awoke, all this was not a dream, but reality. My entire body could not move, and the pain was unbearable.

San Filippo showed total indifference to my injury. On the morning of July 6, I finally obtained San Filippo's home phone number from Professor Zang. I asked him to take me to see a doctor, and only then did he ask me how my back was. I told him that it was worse than the day before. I also asked San Filippo if I had medical insurance, he told me that I did not and then didn't ask me anything else. Instead he kept asking where Zhou Peng was, and he wanted to see Zhou Peng. He didn't find Zhou Peng. By noon time, San Filippo came to

my dormitory, and there were Mr. Gao and another Chinese student present. I asked San Filippo: "You said that my salary is $8,000 and you would deduct $700 from it for my medical insurance. Now how come there is no medical insurance?" San Filippo replied: "Rutgers University changed its regulations in February of this year. Since Mr. Gao and you came after February, you don't have medical insurance. Zhou Peng came before February, therefore he has medical insurance." I asked "Why didn't you tell us earlier?" Realizing he could no longer be evasive, San Filippo then said: "Who would know this kind of thing could happen?"*

Afterwards, he patiently said to me in a dramatized manner: "Even if you go to the hospital to see a doctor, the doctor cannot do very much either. If things turn out to be worse, the doctor might recommend surgery. That can be very dangerous. Even so [the hospital] will charge you a lot of money. Rest well! If you just rest, it will be all all right." That very night he bought me a heating pad.

On July 8, I could really no longer bear the severe back pain. I asked Mr. Gao to bring a note from me to San Filippo "Professor San Filippo: Please take some of your time to take me to the hospital. Thank you." About 3:00 o'clock, San Filippo came to my bedroom. When he walked in the door, with his hands on his hips he asked me how my back was. I told him that the pain had become more severe than the day before. As soon as he heard what I said, he opened his two eyes widely, and shouted loudly: "I'm going to buy you an airplane ticket. Either this Sunday or some other day, I will send you back to China. This is what I can tell you." After saying so, he then left. Zhou Peng also left with him. But after more than half an hour, Zhou Peng and San Filippo came back to my dormitory. San Filippo was in the living room, and Zhou Peng came to my bedroom. While waiting for me to get

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* When he heard that the Chinese Consulate General's office offers a kind of medical insurance, he immediately pretended to be very generous and agreed to let us go to the Consulate office to purchase medical insurance. Furthermore, he said he would write a check for us, but after approximately a month he still did not write a check for us.

up, Zhou Peng said: "Don't you know San Filippo's temperament yet? I didn't tell you yesterday that I knew if you ask him again to take you to see a doctor, he will certainly get mad. Once he gets mad, he could do anything. I just spoke to San Filippo, 'Even if you send him back to China, what will you do then?' San Filippo thought for a long while and then saw the light." When we returned to the living room, San Filippo said to me: "Your English is not very good. When you get to the hospital, let Zhou Peng translate everything for you. You are simply Zhou Peng." At the time, I was quite puzzled and couldn't figure out the reason. Zhou Peng then told me: "You have no insurance. San Filippo wants you to use my medical insurance card." Then I understood that San Filippo was merely using the method of asking me to assume someone else's identity to cheat the insurance company.

In the hospital emergency room [San Filippo]asked me to sign Zhou Peng's name. It was then that Zhou Peng gave me his birth date and I gave it to the doctor to fill out the form. Disregarding what really happened, when San Filippo described my accident he said that I fell off a three foot high ladder; and he deceived the doctor by saying it happened while I was working in the laboratory. The doctor asked me to wait for my turn to be examined. San Filippo said that he had to return to his office, and told Zhou Peng to call him if needed. After having said that, he just left. Not until past 6:30 in the evening did the doctor begin to examine me. After examining my heart, blood pressure, the doctor ordered an x-ray examination for me. From various angles from chest to navel, I had seven x-ray pictures taken. Again I waited for a while, and a doctor told me: "Your spine is normal." Then we drove back to my dormitory. It was about 8:20 in the evening when I left Middlesex General Hospital.

On our way back to the dormitory, San Filippo in a sarcastic manner said: "Now you should feel better." And I said no! He asked me if I would take the pain killer, and I said I would not. (Because I had some Chinese medicine and plasters.) He then asked me what I would do next. I said, "I will do as you say to take a good rest." He then didn't say anything.

When Zhou Peng supported me to walk to my bedroom, on the stairs Zhou Peng told me not to tell anyone else that I used his medical insurance card to see the doctor.

On July 26, San Filippo and Zhou Peng came to my dormitory. San Filippo said: "You should do something now. Go to work. Lying here for a whole day is so annoying and so boring." I said: "I cannot walk that far (from Nichols apartments to W.R. Laboratory.)" He said: "You can ride the bus." I said: "I cannot even sit for a long time. I have to lie down, and I need the rest." He said: "You can work for a while and then find a place to rest." Under his heartless pressure, four weeks after I suffered the injury from the fall, I dragged my weakened and injured body and again began to work for him.

Afterwards, he just checked on my work incessantly, and pressed me to speed up the work. Not until the end of August or the beginning of September did he make an inquiry about my back. I told him that it did not present a big problem ordinarily, but once when the weather changed the back pain reoccurred. Furthermore, [I said] I could not sit for too long. He then didn't ask anything else. He was merely afterwards pressing me to speed up the work. As to my life and death, he was totally indifferent.

Upon hearing that I suffered injury from falling, not only the Chinese visiting scholars and students in my group, but also many other Chinese students and visiting scholars all came to see me. They gave me the small amount of Chinese medicine and plasters in their possession, and also offered some Chinese home remedies for curing my injury. Mr. Gao did his very best to cook for me day and night while I was lying sick on the bed. Professor Zang [Ya-ru] and Ms. Tang Guang-wen brought me delicious food. And there were many others who continuously gave me spiritual comfort. I will remember them forever. Of course I can never forget San Filippo, who in my mind is forever the manifestation of the devil.

Professor is such a noble title. It implies transmitting knowledge, training students, and benefiting mankind. Professor is the engineer of the human soul. However, San

Filippo's language and behavior have greatly disgraced such an honorable title of professor. When I first arrived at Rutgers University, I could not understand some of the words that frequently came out of his mouth. At the time the word or the best word from his mouth that I could understand was "stupid." Later on some people told me: "Don't ask any more. The words frequently coming out of his [San Filippo's] mouth are the unspeakable words here." All these foul words cannot be repeated. Since these words came from the mouth of a professor, not to mention anything elegant or refined, he [San Filippo] is rather like a rascal.

On August 6, he [San Filippo] called me to his office and asked if Mr. Gao and I had participated in the medical insurance plan of the Chinese Consulate General's office. When I told him that Mr. Gao did not know he [San Filippo] wanted us to purchase insurance on our own, he immediately cursed Mr. Gao: "Stupid! I will send him back to China. Here is the United States. If I have told you something, you should do it immediately." All these words have become his daily vocabulary.

What is worse than this was that San Filippo not only used English to scold people, he also had learned from Zhou Peng how to use Chinese to scold and needle people. In his stiff tone he would say [in Chinese] so and so was so stupid and so and so was so ugly, etc. This kind of behavior, if committed by other people, perhaps can be excused; but if committed by a professor, committed by a Rutgers University professor, it is truly regrettable!

Because the computing part of Professor Zang's project was my responsibility, I had many job related contacts with her in addition to social contact. Professor Zang had several decades of experience in teaching and scientific research. She has her own unique methods in conducting scientific work. San Filippo himself did not understand [her methods], and wanted to learn them. Yet he was not humble enough to admit it. Every time when he asked Professor Zang to explain some things to him, he couldn't wait for her to finish and would indiscriminately criticize her. He blindly compared the results

of Professor Zang's experiment with that in current literature, and asked Professor Zang to change her experiment in order to conform to what is in the current literature. Only after Professor Zang had explained to him that her experiment was based on a different system and that the conditions for her experiment were different, did San Filippo drop the matter. Professor Zang is already past 50 years old. About a month before she came to Rutgers University she had some surgery. Her health was not very good, and she intermittently took Chinese medicine. In spite of all this, Professor Zang worked intensely, but he [San Filippo] still incessantly pressed for work progress. Sometimes when she returned a few minutes late from her lunch he would be very displeased. Furthermore, he didn't bother to find out when she had left for lunch. He frequently, for no reason, flew into a rage, which made Professor Zang nervous, frightened and apprehensive every day. He exerted great pressure on Professor Zang's mental state. Because of the stress from her experiment and also the stress on her mental state, Professor Zang lost her appetite for a long time and frequently experienced stomach aches. San Filippo was directly responsible for all this.

During those days when Professor Zang worked in San Filippo's laboratory, she needed to have the results of the experiments computed. The data of the experiments were given to me by San Filippo. Since San Filippo did not know at all how the experiments should be conducted and how the results should be computed, Professor Zang told me after seeing the data and the computation of some of the experiment results to spend some time writing programs and conducting preliminary testing of the program. If it is workable, it would be adopted; if not workable, we would try to improve it. Regarding this work of testing computing, when San Filippo inquired about my work, I just mentioned this to him. After hearing what I said, San Filippo loudly reprimanded me: "I'm your boss. If I tell you to do something, you just do it. You cannot listen to her. If she has something to ask you to do, let her come to see me." [He seemed to imply] that by asking him everything could turn out all right. Does he have any

panacea? I really couldn't understand what mistake we had committed. Doesn't he mean we have committed a mistake in trying to do scientific research well? I am afraid that a normal person would not talk such nonsense.

During his visit to China, San Filippo pretended to appear like a gentleman, with a lovable temperament. Once we arrived at Rutgers University, fell into his deceitful hands and began to work for him, he turned out to be a totally different person. The central message of his boasts in China was "I'm the only one who can support you to come to Rutgers. No one else. I am simply Rutgers. I am the Chairman. I am the President." Once Chinese people came to his group to work, his central message was to let you know that "I am your boss. If I send you back to your country, and make some trouble for you, you will be afraid and under the threat submissively listen to me." I suggest Rutgers University use all possible means to announce to various Chinese Universities, including Nankai University and Jilin University that San Filippo is not the only one at Rutgers who can provide financial assistance to Chinese students and scholars. If any professor's research topic attracts their interest and this professor can provide financial help, as long as the two parties agree, they all can come to Rutgers to work or study. This seems to be common knowledge, but still not quite known to people in some of the universities in China at the present time. As a result, this situation has given San Filippo the opportunity to take advantage and pose as the "Saviour." I fully believe that under the leadership of the humane and sagacious people at your honorable University, Rutgers will certainly speed changes in all these areas.

I came to Rutgers with a healthy body and a cheerful mood. I never thought they would all be buried in the hands of San Filippo. San Filippo's gravely improper behavior not only caused extreme suffering to my body, but also extreme suffering to my mental state.

Under the strong encouragement and at the urging of Mrs. Rose V. Samta, and the warm concern shown by the Dean of the Faculty of Arts and Sciences of Rutgers,

the Chairman of the Chemistry Department, and some other professors, much of my mental anguish was alleviated, and I now have great hope for the lessening of my body pain. I sincerely thank you all. I will engrave in my mind and never forget your humanity, kindness, warmth and sincerity. Furthermore, I would do all I can to further [friendly] relationship between Rutgers and various universities in China.

Finally, I strongly request Rutgers University to hold a legal investigation to deal with the matter and to punish San Filippo's gravely improper behavior which caused severe damage to my body as well as its permanent consequence.

Changhe Xiao
December 5, 1985

APPENDIX Q

Translation of a letter from Professor Zang Ya-ru.

The respected leaders of the [Chemistry] Department and Rutgers University.

Greetings:

I am Associate Professor Zang Ya-ru, a visiting scholar sent from the Chemistry Department of Nankai University in the People's Republic of China. I was supported by the Chinese government and came to work in the laboratory of Professor San Filippo of the Chemistry Department of Rutgers University, helping him to start research in Multiple Phase Catalytic Kinetics. Originally [our University] would like to continue to send people to cooperate with him in research work, but after having undergone this period of work we felt that there was no basis here for experiments in Multiple Phase Catalytic Kinetics. Furthermore, Chinese people were so ill-treated by him. Our leaders decided not to send any more people to come to this place to conduct Multiple Phase Catalytic Kinetics research.

Now I would like to give you a general report of my collective impressions and feelings about working here for the period of May to November. I came to the said laboratory to start work on May 3, 1985 and to continue the research left by Xie Qing-lan in Kinetics of Hydrogenation of Ethylene. The catalysts used are Ni and Ni-Ge. In the first week after I arrived at the laboratory, I classified the data which they had collected in one year into several parts and conducted mechanistic correlation experiments. When I first began to do the experiment, I went to work in the laboratory every day at a little after 7:00 a.m. and continued until past 9:00 p.m. I encountered many difficulties in my work; but I overcame them all one by one. My work progressed very fast. By the end of August, I had completed most of the repeated work, and finished the part of the work that Xie [Qing-lan] had not conducted. I submitted three research reports covering three stages of my work. During this period of time, whenever

I encountered difficulties [Professor] San Filippo did not offer any guidance, but was merely pressing for results. Just as other Chinese people who have worked here said, "if you follow what he [San Filippo] said to do, you certainly would not produce any results." In spite of the fact that I worked so diligently and solved problems for him, he did not treat me as a visiting scholar should be treated. He treated me as an employed servant. Once when we ran out of ethylene gas, which we had already requested for several days but had not yet arrived, I felt that since there was no gas material [for me to do the experiment], it was not necessary for me to come to the laboratory that afternoon. As a result, he telephoned me pressing me for a report. Since the design of the experiment had already been worked out, its report could be submitted only after the experiment had reached a certain stage. Nevertheless, I came to the laboratory, but there was nothing for me to do. I simply had to come.

He [San Filippo] treated people unreasonably. Every day he lectured and scolded other people. My laboratory was inside his office. Every day I came to work with a trembling heart because I did not know when it would be my turn to be scolded. Other people all comforted me saying "you need not be so afraid of him because you are supported by your country. Unlike other people who are supported by him, he will not yell at you." In fact, the truth is not so.

One day we had a black out. The mass spectrometer needed to release the gas. He was at a loss, not knowing what to do. He called for a certain Zhou who also did not know what to do. He then got into a fearful rage and yelled at me saying "from now on you should be responsible for this instrument." In reality, I have never used this instrument at all.

Once the analysis of our experiment data showed the content of D_6 was less than previous ones, and the results from this experiment solved the occurence [sic] of the unreasonable phenomenon of negative value. This should be considered as something very good. He on the contrary had a great quarrel with me, asking me to repeat the experiment. A little while later he then yelled saying "I did not ask you to do the experiment. I want you to find the cause." I told him that I dis-

covered that when the temperature rose the content of D_6 decreased. He shouted loudly: "show me the evidence." I said: "the result of the experiment was the evidence. You see, here the temperature differed 30° C." He said the temperature was not the principal cause. I again suggested several different experiment conditions. Later we discovered that not to follow his idea of "long-term gassing" turned out to be the principal cause [for the success].

When we showed him the distribution curve of deuteriated mixture of ethylene and ethane that we obtained from our experiment the first time, he asked why it was not the same as that in the current literature. I told him that we used the mobile system in our experiment and the one in current literature was based on the intermittent reaction system. Although [in both cases] the rate of conversion is shown in the x-axis, the one in current literature is in direct proportion to time, and in ours the rate of conversion is measured by changing the partial pressure. As a result, the distribution curves are not entirely the same. He then saw the light.

The above several examples illustrate that in this area [Multiple Phase Catalytic Kinetics] he lacks the basic theoretical and practical knowledge. Even so, we could still help him to start research in this area [Multiple Phase Catalytic Kinetics]; but at least he should have a scientific attitude! No, he doesn't. He regards scientific research as something very easy; once you do it, you must succeed. Yet, he has no experience with success. He always wants to produce the data which he likes. Which of them are good, which of them are bad, he has no idea in his mind. He was merely clamoring and yelling. Therefore, our leaders decided not to send any more people to cooperate with him and conduct research in this area [Multiple Phase Catalytic Kinetics]. (The contents mentioned above are included in my fourth experiment report.)

When I mentioned that our leaders expect me to go to other places to see the Multiple Phase Catalytic Kinetic research, he became greatly angry. He shouted saying "the IAP-66 form was issued to you by me and you must work here for one year. I wouldn't even have issued you the form for just several

months. To go to other places is illegal. That is a contract. Ask your leaders to write me directly." All this took place in September 1985. More recently in the morning of November 21, I again raised the question of going to other universities. He was still greatly clamoring "[to go to other universities] is illegal. I will tell your government and your embassy." I told him that I had asked the International Center and was told that I could go to the places that I would like to go. He insisted on my listening to him that he wanted to call the International Center directly, and I did not listen. He insisted on knowing where I wanted to go, and I said it was not yet certain.

He was just like this: using threats and deceitful measures trying to keep me working for him. I have come here for a half a year. Yet, until now I am still an unofficial staff member, because he has never registered me in the department. In short, he treated me in this manner which really made me no longer able to bear it!

Finally, I would like to thank the leaders at various levels at Rutgers University for your concern and guidance. Because of your support and your upholding justice, you have enabled us Chinese to receive friendly treatment in the United States. Once again, I would like to thank you.

Zang Ya-ru
Associate Professor
Chemistry Department
Nankai University
China

November 23 [1985]

NB: All quotation marks, with the exception of those used in the phrase "long-term gassing" (see page 3 of translation), have been inserted by the translator for clarity.

APPENDIX R

November 21, 1985

Dear Prof. Boikiess:

I have told San Filippo that I would stop working with him today.

I will tell you something here:

(1) Since I came here I have finished a series of experiments. I have found the conditions available for determining the distribution of deuterated compounds. I have written them down. So I think I can go now.

(2) "I will go to other universities" I told San Filippo this morning but he said "you are illegal if you go, I am your responsor I will call Chinese government and the Consulate." Then he insisted on knowing where I would go, and he said that he would call the International Center and ask me to listen to his talk. So you had better inform the International Center that do not tell San Filippo anything about me. In case he knows my future university, would you write a letter that proves I have finished the first part of kinetics of hydrgenation and furture testing work concerning the distribution of isotopic compounds.

(3) I will not come to his laboratory, if you have something to tell me call 878-0513.

THANK YOU A MILLION.

Sincerely Yours

/s/ YARU ZANG

Yaru Zang

APPENDIX S

October 27, 1985

Dear Sir:

On July 3, 1985 Mr. Zhou Peng told Mr. Gao Hetian and me that Prof. San Filippo had asked our three persons to do some house work for him.

Professor Filippo drove his car to take us to his home about 8:30 in the morning July 4.(The Independent Day of the States. We should have rest.) When we got his home, Prof. Filippo assigned me to clean the windows, door and porch. I cleaned his windows and door. When I was cleaning the porch the ladder whose rung I was standing on slid down. My chest hit the porch plate edge so my back was hurt, my arms were scrached.

At first I could not stand up and kneelt on the ground for a movement. Then Mr. Zhou and Prof. Filippo helped me lie in a sofa. Prof. Filippo said "he was shock, don't do work any more", and gave me a cup of juice. I lay in the sofa for more than half an hour,then he sent me back to my dorm around noon.

I was dizzy and headache that afternoon lying in the bed. I slept for the whole afternoon and all the night, but the pain on my back was worse. I could not contact with Professor Filippo until the morning of July 6. I made a phone call to him. I asked him to take me to hospital to get medical care. He asked me how my back was. I told him pain on my back was severe than before. I asked him wether I had health benifit? He told me I had no health benifit. After that he didn't talk to me any more but insisted on meeting Mr. Zhou. Around noon Prof. Filippo came to my dorm. I asked him why I had no any health benifit? You promised that you would pay me $8000 including $700 health benifit. Yes, he replied but the university changed the rule on Feberary 1985, you came here in June, so you had no health benifit. Even you saw a doctor, the doctor probably has no efficient way to treat it but

charge a lot of money. He told me to have a good rest and in the evening he bought me a heating pad.

I could not bear the pain on my back and I had stayed in bed for days Iasked Mr. Gao send Prof. Filippo a massage that took him some time and sent me to hospital. Prof. Filippo went to my dorm and asked me how my back was. I told him my backbone was sore. I could not get up, and was severer than the day before. He was very angry, and shouted to me "I'll buy a plane ticket, you can go back China this Sunday or some other day you like. This's what I can tell you." Then he went away. But half an hour late he, together with Mr. Zhou Peng, went to my dorm and took me to Middlesex General Hospital.

Finishing X-ray examination, the dorctor told me that your backbone was Okay.

Dizzing bothered me for one week. I lay on the bed for almost one month. During this period of time many Chinese students and collegues sent me Chinese medicine and Chinese Plaster (which gave me a lot of help in my back recovering). I applied them for almost three months. Mr. Gao cooked for me (at that time I couldn't cook and couldn't go anywhere I want by myself.) On the early begining of the August he went to my dorm and asked me to do some work, he said always lying on the bed was boring. I told him that I couldn't walk that long (from Nichols Apt to my lab). He told me you took campus bus. I told him I could not sit too long in the lab. I needed lying and rest. He told me I could go somewhere to have rest while I work. I had to go back to my work.

More than four months passed. Now I usually have no pain on my back, but whenever the weahter changed, doing something heavy or sit somewhere a long time my back is sore.

All the above is true.

Sincerely

/s/ CHANGHE XIAO

Changhe Xiao

APPENDIX T

3.90. Academic Freedom.

3.91. Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, every member of the faculty of this University is expected, in the classroom and studio, in research and professional publication, freely to discuss subjects with which he is competent to deal, to pursue inquiry therein, and to present and endeavor to maintain his opinion and conclusions relevant thereto. In expressing those ideas which seem to him justified by the facts, he is expected to maintain standards of sound scholarship and competent teaching. He shall conduct himself in accordance with the standards of professional ethics set forth in paragraphs I to V, inclusive, of the Statement on Professional Ethics adopted by the American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics

"I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.

"II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the

best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

"III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

"IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.

"V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession,

and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

3.92. Outside the fields of instruction, artistic expression, research and professional publication, the faculty member, as a private citizen, enjoys the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights. The conduct of the faculty shall be in accordance with standards dictated by law.

3.93. After the expiration of a probationary period, faculty members should have permanent or continuous tenure, and their service should be terminated, except in the case of retirement for age, only (1) for adequate cause as defined in section 3.94; or (2) under extraordinary circumstances because of financial exigencies; or (3) when the teaching, research, or extension program in which the faculty member is involved is terminated and said faculty member cannot be properly prepared for alternative duties.

3.94. Recommendations regarding dismissal of a tenured faculty member or a nontenured faculty member prior to the completion of his or her contract, when the ground is failure to maintain standards of sound scholarship and competent teaching, or gross neglect of established University obligations appropriate to the appointment, or incompetence, or incapacitation, or conviction of a crime involving moral turpitude, are made to the president through the executive vice president and chief academic officer and the appropriate provost by deans of colleges and schools, with the advice of the faculty committee on appointments and promotions, and

with the advice of the tenured faculty, at, or above, the particular rank in the faculty member's department.

3.95. The recommendation may be initiated at the departmental level; or the appropriate dean or director, the appropriate provost, the executive vice president and chief academic officer, or the president may direct that advice be given from the departmental level. A group of students who have taken courses with the faculty member may petition the department to consider the initiation of tenure termination proceedings.

3.96. Those responsible for academic dismissal at each level are to base their recommendations without discrimination because of race, religion, sex, views on any subject, or natural origin. They shall utilize the judgment of faculty peers, and shall utilize the judgment of students, especially those with majors in the appropriate department.

3.97. If the President of the University finds reason to believe that a faculty member should be dismissed when the ground is that he has been convicted of a crime involving moral turpitude, or is incompetent, or incapacitated, or has failed to maintain for himself standards of sound scholarship and competent teaching, the President shall send the faculty member a notice stating in detail the charges against him and informing him that he is entitled to a hearing if he shall ask for it within two weeks and that, in the absence of a request for a hearing, he may be dismissed from the faculty.

3.98. If the faculty member requests a hearing, it shall be held by a panel of five, selected by lot from the elected members of the University Senate; but the parties may first exercise a reasonable number of challenges, and a member of the Senate may be excused from service on the panel at his own request, for good cause. The procedure at the hearing shall fully conform to the concept of due process; but the hearing shall not be public unless the respondent so requests. The President of the University shall designate a lawyer or a mem-

ber of the faculty to present the charges, and the respondent shall be entitled to the aid of counsel. His reasonable expense shall be paid by the University. No administrative officer of the University shall participate in presenting charges, or as defense counsel, or as member of the panel.

3.99. The panel shall determine whether the charges, or any part thereof, are true; whether the matters charged and proved constitute ground for dismissal under section 3.93 above; and whether, taking into consideration the respondent's previous record and his value to the University, he should be dismissed or otherwise disciplined.

3.99a. The report of the panel shall be presented to the Board of Governors and a copy thereof sent to the respondent. Written as well as oral argument may be submitted to the Board on behalf of the President and the respondent. If further evidence is required by the Board, the panel shall be reconvened to receive it and to make any further findings that may be appropriate. The Board shall accord great weight to the findings of the panel, and its final action affirming, revising, or modifying the panel shall be by vote for such action by at least six members of the Board.

No. 94-872 (3)

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are parties before this Court and the names of all parties appear in the caption of this case.

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No. 94-872

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL BONGIAVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY

Petitioners

-against-

JOSEPH SAN FILIPPO, JR.

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari filed in this matter. The petition raises no special or important issue not previously settled by this Court. In addition, as to two of the questions presented, there is no conflict with any other Circuit or with prior decisions of this Court. Furthermore, this case presents a unique factual pattern in which the Court of Appeals held that summary judgment should not have been granted on the basis of the record below, in light of the many factual issues in dispute and in light of the failure to afford discovery to Respondent. Even if this Court

granted certiorari and reversed the decision of the Third Circuit on the grounds raised in the Petition, the decision below must be still be affirmed and the case remanded for trial, since many issues still remain in the case. The posture of the case is such that review at this time is premature.

STATEMENT OF THE CASE

A. Counterstatement of Facts

Respondent's Record at Rutgers: Respondent was a tenured Professor of Chemistry at Rutgers, the State University, with a distinguished teaching and research record over a seventeen year period.[1] The Senate Panel that recommended his dismissal commented: "Professor San Filippo has an excellent record, as evidenced by his long list of publications and promotion to the rank of professor in 1984...He is an active research[er] with an international reputation...His research accomplishments are an asset to the University's quest for excellence and distinction. There is no doubt that Professor San Filippo has made positive contributions to the University." (A118)[2]

Another manner in which Dr. San Filippo distinguished himself at Rutgers was his repeated objections to what he considered dangerous, improper or even illegal activities at the school. As the District Court below noted in its initial decision in this matter:

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[1] As noted in its title, Rutgers is the State University of New Jersey, and is a "state actor" for purposes of applying the due process clause of the 14th Amendment. However, it does not enjoy 11th Amendment immunity because of its independent financial position in the State, see Kovats v. Rutgers, the State University, 822 F.2d 1304 (3d Cir. 1987).

[2] Respondent adopts the Petitioners' record notation system, referring to the Appendix to the Petition as "App." The Appendix in the Third Circuit will be referred to as "A."

> Professor San Filippo had to have been a thorn in Rutgers side, continually voicing complaints and filing grievances and arbitrations concerning a variety of matters and filing at least three legal actions against the University aside from this action, conduct which played no explicit part in Rutgers decision to terminate him. (743 F. Supp. at 328)(emphasis added).

The complaint describes at least nine constitutionally protected activities taken by Dr. San Filippo which he alleges were the basis for retaliatory action by the University. (A33 et seq; App. 6-10; 72). Some of his complaints focused on illegal funding decisions made by his department (including improper deductions from his federal grants), the manufacture of illegal drugs at the laboratories and safety conditions affecting students. (App. 22; A83-84). He also brought three lawsuits and two grievances against the University, one leading to a formal arbitration proceeding and the other to a law suit brought on Respondent's behalf by the Rutgers chapter of the AAUP. (App. 6-10, 72).

There is no question but that Respondent's actions created antagonistic feelings among members of his department and among school administrators. The Department admonished him for "washing [its] dirty linen in public." (App. 7). Dean Tilden Edelstein, one of the administrators who later initiated the charges against Respondent, later stated to a newspaper reporter: "If he had behaved better earlier in terms of his relations with his colleagues," he might have been treated differently. But he persisted in being "Joe the Warrior." (App. 20; A606)[3]

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[3] In addition, the Arbitrator who heard one of the grievances against Respondent, commented on the conspicuous and obvious hostility manifested against Respondent by senior members of his department, including the chairman. (App. 12-13).

The Charges: In late 1985, certain charges were brought against Respondent focusing on his alleged treatment of certain Chinese contract employees at his laboratory (not students but co-employees of the University). Petitioners' discussion of the manner in which the charges arose misstates certain key facts.

Petitioners claim that the allegations of Respondent's alleged mistreatment of several foreign nationals, in particular, Messrs. Xiao and Mr. Gao and Ms. Zang, were spontaneous and prompted by a janitor's report. In fact, the complaints filed by Messrs. Xiao and Gao and Ms. Yaru Zang, as well as that later made by Ms. Chen, were solicited over the course of several secret meetings arranged by Respondent's chairman, Dr. Boikess or acting-Chairman, Dr. Potenza, (A813) both of whom were cited by an impartial arbitrator as individuals who harbored strong animus toward Respondent and whose testimony lacked credibility. (App. 8-9; A805-08, 1151-56, 1163).

Concerning Ms. Zang's allegations, Petitioners neglect to tell this Court that these charges were dismissed in their entirety by the faculty Senate Panel. (App. 157; A86). At the same time Petitioners also ignore the fact that the University's principal complainant, Mr. Xiao, approached Dean Tilden Edelstein in an attempt to withdraw the complaints, but that Dean Edelstein imposed such humiliating requirements on Mr. Xiao before he would consent to permit him to withdraw the charges that Mr. Xiao abandoned his attempt. (A817-18, 1618-34). [4]

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[4] The record also reveals that Dean Edelstein went out of his way to prejudge the issue even before Respondent was informed of the charges. The Dean wrote a letter to the complainants -- in which he "... expressed] [his] appreciation for [their] cooperation in [the University's] investigation of matters related to the professional conduct of Prof. Joseph San Filippo....I am authorized to expressed the appreciation of the Central Administration of Rutgers University for the courage and honesty you have displayed...Your actions are a credit to your country and to the integrity of the chemistry field." (A814-15, 1200). When

With respect to the charge that Respondent had filed a "false time report," the University waited seventeen months before deciding that any wrong had been committed. As disclosed in the sworn testimony of Jack Gordon, the University administrator who specially authorized Respondent's actions which led to his being charged with wrong-doing (A1740), the events occurred in August, 1984 (while Dr. San Filippo was out of the country on a lecture tour). On his return in November, 1984, Respondent openly told school officials what had occurred. Petitioners wrongly state that the University only learned of this fact after the complaint made by the visiting Chinese scholars (Pet. at 6). In fact, the record clearly reveals that the University sent two letters (one dated December 20, 1984, and the other dated January 9, 1985) accusing Dr. San Filippo of "deliberate[ ] falsification" in filing the time reports (A1187, 1189-90). However, no formal charges of any kind relating to this matter were filed against plaintiff until August, 1986 (A811). In addition, if there was any impropriety involved, why did the University subsequently offer a permanent position to the technician who signed and submitted the allegedly falsified time report while Dr. San Filippo was out of the country? (A811). [5]

Petitioners refer to the alleged impropriety regarding the authenticity of a letter of recommendation submitted by Dr. San Filippo on behalf of Mr. Peng Zhou, a visiting scholar in respondent's laboratory. The alleged impropriety arose when an Executive Officer in the Chemistry

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asked during his deposition why he had written such a letter, Dean Edelstein stated, "...the purpose of this letter was to beef up their [complainants'] backbone." (A815).

[5] As a University-approved contract employee from 1981 through mid-1984, the technician involved, Ms. Brownawell, was routinely compensated for her overtime with compensatory time which she generally took as a paid vacation in August. No one ever stated any disapproval with this practice. Indeed, compensatory time is widely, regularly and routinely used throughout the University.

Department, Dr. Martha Cotter said she became concerned about a letter of recommendation bearing the name of Professor Liu Guozhi which had been submitted in support of Mr. Peng Zhou's application for admission to the graduate program in chemistry. Prof. Liu had given this letter, hand-written in Chinese, to Dr. San Filippo while Respondent was lecturing in China and asked him to hand-deliver it to Mr. Zhou. Respondent obliged. Prof. Liu asked Mr. Zhou to translate his letter into English and submit it with, and in support of, Mr. Zhou's application. Mr. Zhou complied and Dr. San Filippo, as a courtesy, smoothed the English before having it typed. (A843). However, there never was any question that the content of the letter correctly reflected Prof. Liu's recommendation.

Petitioners also misrepresent the circumstances surrounding respondent's alleged misconduct in assigning Mr. Zhou the employment title "Postdoctoral Fellow". As the record clearly shows, Respondent not only was following an established practice within the chemistry department (A1794), but acted with the expressed approval of the dean's office, as disclosed in the sworn testimony of the University's own witness. (A841-43, 1804-08).

Petitioners have also omitted significant facts from their assertion that Respondent was guilty of "insubordination." The December 16, 1985, prohibition which petitioners cite as the basis for this charge, was contravened on numerous occasions by both its author, Chairman Boikess, and acting-Chairman, Dr. Potenza. (A845-47). Moreover, respondent testified that he acted on the contention -- upheld by the faculty Senate Panel which disregarded this charge in its findings (A116) -- that the original prohibition (A845-47) were a violation of his due process rights. (A1843).

The Conduct of the Hearing: Formal charges were filed against Respondent in August, 1986. Hearings to consider the charges were initiated before a Senate Panel of five faculty members chosen by lot, none of whom had any legal training. The hearings began in March, 1987 and continued through September, 1987. The University was

given every opportunity to present its entire case, often introducing extensive hearsay testimony over objection. (A849). The Panel, after receiving an ex parte communication from University Vice President Susan A. Cole granting them summer salary benefits and encouraging them to abbreviate the hearings, ordered an absolute time limit for the remainder of the proceedings and divided the remaining time equally between the two sides, which it measured with a chess clock. (A849)

Another problem arose with respect to compensation to be paid to the members of the Panel, as a result of the unexpected length of the proceedings. In view of the heavy demand on their time, the members of the Panel sought additional compensation from the Rutgers Administration, represented by the Vice President for Personnel, Susan A. Cole, the chief "prosecutor" of the charges against Dr. San Filippo.[6] It appears that the chairman of the panel, Professor Ted Szatrowski, had been secretly discussing additional compensation for the panel members with Vice President Cole continuously throughout the course of the hearings. (A1959). When Professor Szatrowski complained (again during ex parte discussions) that the Panel had to continue its work into the fall months and therefore deserved still further compensation, Dr. Cole responded that she would not consider the request for further compensation until after the hearings ended, but suggested that she would reconsider the matter at that point (A858, 1959).

In fact, after the hearings were completed and the Panel issued its decision in favor of the administration finding Dr. San Filippo guilty of dismissible offenses, its members received generous salary increases. This occurred

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[6] Vice-President Cole had a significant role in the drafting, investigation and recommending of the charges against plaintiff. (A819-20). In addition, Dr. Cole was introduced at the hearings as the official representative of the President and the highest official of the Administration that was prosecuting the charges. (A1898).

in February, 1988, through the efforts of Dr. Cole. (A1206, 1863-65, 1883-91). Except for a brief exchange about the possibility of summer salary payments, all of these discussions about additional salary occurred off the record without any notification to Respondent or his representatives. (A1972-74).

On May 13, 1988, the Board of Governors upheld the findings of the Senate Panel and ordered Dr. San Filippo dismissed. (App 95-148)

There was one dissent, by member Walter Wechsler, who stated that "the punishment is clearly out of proportion to his alleged wrongdoing, and quite possibly tainted by a long history of animus." (App. 145) He noted the lack of precedent for the punishment: "It is difficult to imagine that, among the thousands employed by the University, only Professor San Filippo had committed offenses of this nature." (App. 145). He concluded:

> The sanction imposed on Professor San Filippo could be the death knell of his career in higher education. Before sustaining that sanction, we must insure that it was chosen as the result of objective and careful deliberations and is proportionate to the offense." (App. 148)

B. Proceedings Below

Two months after the decision dismissing Dr. San Filippo, this action commenced. The complaint filed by Respondent under 42 U.S.C. §1983 contained four constitutional claims: (1) the regulations under which he was dismissed were void for vagueness; (2) the proceedings brought against Dr. San Filippo were initiated in retaliation for his exercise of First Amendment rights; (3) Respondent was deprived of equal protection through the selective enforcement of the disciplinary proceedings because of his exercise of First Amendment rights; (4) Respondent's procedural due process rights were violated because of the financial interest of the members of the Senate Panel who

conducted the proceedings. He also added a claim under the New Jersey constitution and a pendent common law claim for breach of contract. (A8).

While the parties were engaged in extensive discovery, but while many outstanding requests for information and documents made by Dr. San Filippo remained unsatisfied, Rutgers moved for summary judgment on all the claims. Respondent opposed that motion with extensive factual submissions. After reply papers were filed, Respondent cross-moved for summary judgment and to amend the complaint. The district court allowed the amendment and a Third-Amended Complaint was filed (A33).

After argument on the pending motions, the District Court issued its initial decision denying the University's motions and granting Respondent's motion for partial summary judgment on the vagueness cause of action, 743 F. Supp. 327 (D.N.J. 1990). The District Court held that the words of the regulation did not give fair warning that they covered ethical violations. The court noted that the term "ethics" is not referred to in the dismissal regulations and the word "dismiss" or "dismissal" does not appear in the ethics regulations. Ethical considerations were at the heart of the entire effort to dismiss Dr. San Filippo, the Court held.

On interlocutory appeal, the Third Circuit reversed the decision of the District Court, dismissed the vagueness claim, and remanded the case for further proceedings, 961 F.2d 1125, 1137 (3d Cir. 1992). This Court denied a writ of certiorari, 113 S. Ct. 305 (1992).

The University then renewed the pending motions for summary judgment on the other claims in the complaint -- First Amendment retaliation/equal protection, procedural due process and three state law claims. The district court referred the matter to Magistrate Judge Stanley R. Chesler for a Report and Recommendation. Oral argument was held before the Magistrate Judge on February 2, 1993 (A2017 et seq.). On May 25, 1993, the Magistrate Judge issued a

Report and Recommendation dismissing the state law claims, dismissing the procedural due process claim, but denying Rutgers' motion for summary judgment on the First Amendment retaliation/equal protection claim. (A2121-65)

On the First Amendment retaliation claim, the Magistrate Judge noted that Dr. San Filippo had engaged in protected First Amendment activities, including his various complaints about safety conditions in the chemistry department, the investigation into the manufacture of illegal drugs and the improper diversion of funds from his federal grants, all of which were matters of "public concern." (A2139). The Magistrate Judge also held that the law suits, grievances and arbitrations filed by Dr. San Filippo were protected by the petition clause of the First Amendment regardless of whether they constituted a matter of public concern.

The Magistrate Judge noted that Dr. San Filippo had also shown that his protected activity was a "substantial factor in the alleged retaliatory conduct," Mt. Healthy, 429 U.S. at 287, since the adverse employment action closely followed the exercise of protected rights. Thus the burden shifted to Rutgers to show that they would have terminated Dr. San Filippo even in the absence of the protected activity. (A2149). The Magistrate Judge concluded that summary judgment on this aspect of the case was not appropriate since Respondent had been denied discovery on whether persons similarly situated who had not engaged in protected activity had been as severely sanctioned. [7]

The parties then filed cross-objections to the Magistrate's Report and Recommendation, Respondent complaining of the failure to grant summary judgment on the procedural due process claim and the Petitioner

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[7] The Magistrate Judge also denied summary judgment on the equal protection claim since the claim of selective enforcement tracked the First Amendment retaliation claim and thus both claims must be weighed under the same legal standard. (A2151-52).

complaining of the failure to grant summary judgment on the First Amendment retaliation/equal protection claim. The District Court, without oral argument and without permitting either party to submit additional papers in support of the Magistrate Judge's rulings with which they agreed, dismissed the entire complaint.

The District Court agreed with the Magistrate Judge that Dr. San Filippo had shown that he had engaged in protected First Amendment activities. Contrary to the Magistrate Judge, however, the Court held that the filing of grievances and law suits were not protected by the petition clause of the First Amendment unless the underlying issue of the proceeding involved a matter of public concern. (App. 77). Nevertheless, the Court concluded that the other complaints Dr. San Filippo made about safety considerations in the chemistry labs, possible illegal activities, financial irregularities and misuse of funds were matters of public concern and thus Respondent had met the first part of the Mt. Healthy test. (App. 83).

The Court also concluded that Dr. San Filippo had shown a "causal connection" between his constitutionally protected activities and the adverse action taken against him. There was a close connection in time between the complaints of financial irregularities and the initiation of charges against him: "At least as to plaintiff's disputes [with his department] in or about 1986, plaintiff has demonstrated sufficient evidence to raise an inference of retaliation." (App. 86) Thus Dr. San Filippo had "met his burden . . . of establishing a prima facie case of retaliation." (Id).

The burden then shifted to the Petitioners to show (not merely to articulate, as in the Title VII context) that they would have dismissed Dr. San Filippo even in the absence of the protected conduct. The court, however, held that there was "no basis in the record upon which to conclude that plaintiff's dismissal on the nine charges was a pretext for his exercise of protected speech." (App. 91). Furthermore, the District Court rejected the Magistrate Judge's conclusion that, pursuant to Rule 56(f), Respondent should have the opportunity to complete his discovery and

to obtain the additional information he had already requested on whether there were other faculty members who were "similarly situated." That is, they had committed acts of comparable seriousness but no charges had been brought against them. This information would tend to show that the "defendants' proffered explanation was indeed pretextual." (A2150).

The District Court held that Dr. San Filippo was entitled to obtain discovery only with respect to faculty members who were "truly 'similarly situated'" with him. (App. 90) But the Court defined such persons as a "tenured faculty member who had 'been known to commit' or was 'accused of committing' offenses of the kind, number, and scope taken together" which were identical to those charged against plaintiff. That is, Dr. San Filippo was entitled to obtain discovery only with respect to a faculty member who was a mirror image of Respondent in that he had committed exactly the same type and number of offenses, but against whom no charges had been brought. "No one suggests that such a person exists." (App. 89-90). On that basis the Court concluded summary judgment should be awarded to Petitioners on the First Amendment retaliation claim.

C. The Decision Sought to Be Reviewed.

An appeal was then taken to the Third Circuit which unanimously reversed the grant of summary judgment by the District Court.

The Court found that summary judgment should not have been granted against Respondent on the First Amendment retaliation claim for three separate reasons:

(1) Respondent had sought discovery on specific issues relating to the First Amendment retaliation claim, including information relating to similarly situated faculty members accused of committing similar offenses against whom no charges were brought; that discovery had not been afforded him; the district court refused to order the additional discovery; the Court of Appeals held that since "the information sought in discovery was of the sort that

might prevent the grant of summary judgment and was under control of Rutgers, we conclude that it was an abuse of discretion to deny San Filippo's Rule 56(f) motion." (App. 19).

(2) even without further discovery, there was sufficient evidence in the record to create genuine issues of material fact that precluded the grant of summary judgment; this included the statements of the Dean instigating the charges who called Respondent "Joe the Warrior," and the statement of one of the dissenting members of the Board of Governors who said that the penalty imposed on Respondent was "quite possibly tainted by a long history of animus," (App 20).

(3) there was record evidence that other faculty members had committed infractions of comparable seriousness yet had not been punished, raising an inference that other considerations may have influenced the University's decision to dismiss Respondent, including possible First Amendment activities; (App 20).

After concluding that summary judgment was inappropriate on these bases, the Court went on to discuss subsidiary issues relevant to the "course of proceedings on remand." (App. 20). There was no doubt that Respondent had engaged in some First Amendment activities, including the expression of speech involving matters of public concern. These included his complaint about illegal activities in the Chemistry Department, safety conditions in the laboratories and improper financial activities by members of his department with respect to federal funds granted to the Respondent or the school. In addition, Respondent had claimed that the jury should be instructed that his lawsuits, grievances and arbitrations also should be considered constitutionally protected activities, as petitions for redress of grievances. This issue was not crucial to the decision below, but was simply another example of the constitutionally protected actions that Respondent was asserting led to retaliation in this case.

The Court held that such lawsuits, grievances and arbitrations were constitutionally protected actions even if the subject matter of the suits was not a matter of public concern. The Court explained:

> ...when government -- federal or state -- formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the mechanism its constitutional imprimatur. (App. 35)

The Court found that the "petition" clause of the First Amendment has a longer history and a different purpose than the speech or press clause. Thus it should not be interpreted exactly as the free speech clause, "a graceful but redundant appendage of the clauses guaranteeing freedom of speech and the press." (App. 37).

The Court of Appeals also held that Respondent had submitted sufficient evidence to create a disputed issue of fact as to whether Respondent's constitutionally protected activities were a "substantial factor" in the decision to dismiss him. This was shown by the statements of the Dean about "Joe the Warrior," the dissenting comments of Governor Wechsler about the "long history of animus," and the evidence of other faculty members committing similar offenses but not being punished. In addition, the Court found that the close proximity in time between some of Respondent's First Amendment activities and the adverse employment action could create an inference of retaliation. "This inference would be particularly strong if the plaintiff can show that the decisionmaker lacked a pretext on which to dismiss the plaintiff until shortly before the time of dismissal." (App. 40).

Finally, the Third Circuit held that the University itself could be found liable for the retaliatory actions noted

in the record. Under Monell v. Department of Social Services, 436 U.S. 658 (1978) and St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988), a governmental body can be held liable only if the actions complained of were the result of an official policy or custom of the body. The Court found that there were sufficient allegations and proof in the record of the University's "deliberate indifference" to the retaliatory actions taken by the administrators in bringing the charges. Here there is no question but that the members of the Board of Governors who passed upon the charges against Respondent and determined to dismiss him were aware of his claims of improper retaliation. The Magistrate Judge had noted that "the record is replete with evidence which indicates that the information regarding San Filippo's protected activities was well known to the individual members of the Board." (App. 43). This was also shown by the dissenting opinion of Walter Wechsler. Substantial material showing the improper motivation was also presented to the Board of Governors by Respondent's attorney. (App. 44). The Court found that "this evidence suffices to create a question whether the ultimate decision-maker acted with deliberate indifference to the plaintiff's First Amendment rights by approving the recommendation that the plaintiff be dismissed." (App. 44).

Adopting this Court analysis in Waters v. Churchill, 62 U.S.L.W. 4397 (1994), the Third Circuit interpreted that decision as requiring employers "to tread with a certain amount of care," when First Amendment rights are implicated, that is, when a public employee is threatened with dismissal after exercising such rights. Thus the policy makers of a governmental body must not be "deliberately indifferent" to charges of retaliation when informed of such accusations.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW RAISES NO SPECIAL OR IMPORTANT ISSUE NOT PREVIOUSLY SETTLED BY THIS COURT.

I. The Third Circuit decision sought to be reviewed is totally consistent with this court's prior decisions and does not present any novel issue requiring review.

The Petition presents a false issue to this Court. Petitioners claim that the decision below presented an allegedly interesting, "important question affecting the public interest," Pet. at 10, namely whether a non-sham lawsuit or formal grievance or arbitration is a "petition for redress of grievances" which cannot be the basis for retaliatory action by government.

However, as noted above, that question is but one of four issues decided by the Third Circuit which required the reversal of the summary judgment motion. The Court voted, unanimously, since Judge Becker joined all other aspects of the decision, (App. 50) that summary judgment should not have been granted by the district court for three separate reasons: (1) proper discovery had not been afforded Respondent, bearing on the University's motivation is dismissing Respondent; (2) even without that discovery, there were material disputes as to the University's reasons for dismissing Respondent since explicit remarks by the University's administrators indicated that his campaign against improper activities in his department (which clearly involved matters of public concern) created an animus against him in the University; (3) Respondent presented evidence that others in the University committed similar offenses but were not disciplined as severely. [2]

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[2] This Court established the basic proposition that discriminatory treatment of similarly situated employees constitutes evidence of improper motivation, even if a fact-finder concludes that the plaintiff did commit dismissible

Those unanimous, non-controversial findings by the Court below are not challenged by Petitioners here and would therefore remain in the case regardless of this Court's action in the future. On the face of the record in this case, the disputed evidence as to the motivation of the University in dismissing Respondent will remain. [9]

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offenses, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)(black employee fired for improper "stall-in" but claimed that the reason was a pretext since other white employees had engaged in similar disruptive conduct but had been retained; employee must be given an opportunity to show that an employer's stated reason was pretextual: "Especially relevant to such a showing would be evidence that while white employees involved in acts of comparable seriousness to the 'stall-in' were nevertheless retained or rehired.") See also Holley v. Seminole County School District, 755 F.2d 1492, 1505 (11th Cir. 1985): "If other teachers had been engaged in similar improper conduct known to the superintendent . . . and those teachers were not disciplined, an obvious inference is raised that Holley was disciplined for reasons other than the improper teacher conduct."

[9] Under well-established law applying this Court's decision in Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), a plaintiff must show that he had engaged in protected activities and that such activities were a "motivating factor" in the decision to take the adverse action. This can be shown "indirectly by showing that the protected activity was followed closely by discriminatory treatment" or "through other evidence such as disparate treatment of fellow employees who engaged in similar conduct," or "directly through evidence of retaliatory animus," Taitt v. Chemical Bank, 849 F.2d 775, 777 (2d Cir. 1988) quoting from DeCintio v. Westchester County Med. Center, 821 F.2d 111, 115 (2d Cir. 1987)(emphasis in original). In this case, Respondent has satisfied all three parts of this rule and has provided both indirect and direct evidence of causation. That showing also created a disputed issue of fact as to the whether the employer would have fired the public employee in the absence of the protected

In addition, the determination that the initiation of non-sham litigation is protected by the petition clause of the First Amendment has never been disputed by this Court. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), this Court noted: "Rights of access to the courts is indeed but one aspect of the right to petition [for redress of grievances found in the First Amendment,]" and therefore the bringing of litigation by certain trucking companies could not be the basis of an antitrust claim, unless the suit was a mere sham for harassment purposes. See also Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-43 (1983)(state court suit brought by employer involving genuine factual issues cannot be enjoined by NLRB: "Considering the First Amendment right of access to the courts . . . [the] filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice.")

The proposition established in the above cases is an obvious one. Regardless of the content of the lawsuit, government must encourage its citizens to use peaceful, dispute resolution procedures to resolve disputes, and there should be no obstacle or threat placed in the way of those who would invoke that channel. It is not the content of the lawsuit, but the mechanism itself that is a matter of public concern.

Numerous lower court cases also place non-sham litigation under the protection of the First Amendment's petition clause, see Brookins v. O'Bannon, 699 F.2d 648, 652 (3d Cir. 1983): "The right to petition the courts, no less than the right to petition the legislative or administrative bodies, is protected by the first amendment"); Goff v. Burton, 7 F.3d 734, 736 (8th Cir. 1993)("Prison officials may not retaliate against an inmate for filing legal actions in the exercise of his constitutional right of access to the courts"); Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988)(if

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conduct, see Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984): "The plaintiff's evidence might serve both to establish a prima facie case and discredit a defendant's explanation."

prisoner transferred in retaliation for exercise of First Amendment rights, Section 1983 claim will lie); Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989) (bringing false disciplinary proceedings against prisoner in retaliation for his bringing lawsuit against prison official is First Amendment violation); Smith v. Maschner, 899 F.2d 940 (10th Cir. 1990) (prisoner stated valid cause of action in asserting that officials retaliated against him for exercising right of access to courts); Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986)(action taken in retaliation for filing lawsuits violates prisoner's First Amendment rights).

The principle is not confined to prisoners. The courts have been clear that whenever any government official takes adverse action against any person because of, or in retaliation for, the exercise of the First Amendment right to have free access to the courts, a constitutional violation occurs. See Serrano's Gasco, Inc v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989): "The right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances. . . . Deliberate retaliation by state actors against an individual's exercise of this right is actionable under section 1983"); Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)(claim that false charges were filed to coerce plaintiff into dismissing law suit stated a claim under the First Amendment: "This was sufficient for pleading purposes to state a cause of action for retaliatory conduct in violation of Duvall's first and fourteenth amendment rights"); Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1428 (8th Cir. 1986)("state officials may not take retaliatory action against an individual designed to punish him for having exercised his constitutional right to seek judicial relief"); Graham v. NCAA, 804 F.2d 953, 959 (6th Cir. 1986)(claim that student kicked off University football team in retaliation for filing state court action could be violation of constitutional right of access to the courts).

It is true that some lower federal courts have established a different rule when public employee litigation is involved, incorporating the requirements of Connick v. Myers, 461 U.S. 138 (1983) that the underlying litigation

must involve a matter of public concern. See cases cited in App. 31. [10] But those decisions are themselves inconsistent with the broader position established by this Court in California Motor Transport Co., supra, and the other cases cited above. [11]

Nor is the decision below inconsistent with McDonald v. Smith, 472 U.S. 479, 483 (1985). That case simply held that in a suit for defamation, the petition clause

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[10] It must be noted that not all of the cases cited by the Third Circuit (App. 31) nor all of the cases cited by Petitioners (Pet. at 11-12) involve public employee litigation. Thus, for example, the Court below cited White Plains Towing Corp. v. Patterson, 991 F.2d 1049 (2d Cir. 1993) as establishing a "public concern" requirement for lawsuits brought by public employees. But that case involved a towing service which complained by letter and other communications that they were not getting enough business and were being defamed by the police and then claimed that they were terminated as a result of those communications. However, Respondent does not dispute that at least two Circuits have explicitly held that the filing of a lawsuit not involving a matter of public concern cannot be the basis for a constitutional claim. See Ratjen v. Litchfield, 878 F.2d 837 (5th Cir. 1989) and Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th Cir. 1987).

[11] Petitioners also claim that it is anomalous to treat lawsuits and grievances differently from ordinary speech and testimony in connection with private litigation, which they claim is not protected by the First Amendment. (Pet. at 13-14). However, the premise is incorrect. See e.g., Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1578 (5th Cir. 1989)("When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern...We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state."

does not provide "absolute immunity from damages for libel." It certainly does not stand for the proposition that the petition clause of the First Amendment is identical to the free speech or free press clauses in all respects -- a "graceful but redundant appendage of the clauses guaranteeing freedom of speech and the press," as the Court below said (App. 37). Indeed, the historical record outlined by this Court in McDonald and by the Court below, undermines any such claim.

Thus since the issue on which certiorari is sought would not finally determine the controversy between the parties and since the decision below is not inconsistent with prior decisions of this Court, certiorari should not be granted.

II. The decision below imposing possible liability upon the state university is not inconsistent with this court's decisions in Monell v. Department of Social Services, 436 U.S. 658 (1978) and St. Louis v. Praprotnik, 485 U.S. 112 (1988) or Canton v. Harris, 489 U.S. 378 (1989). In any event, review of the Monell issue is premature, since Respondent presented sufficient evidence to show that the Board of Governors was aware of the retaliatory action complained of and therefore summary judgment was properly denied.

Petitioners do not claim that the Monell issue raised by them (Point II of the Petition) involves a conflict with any decision from another circuit. Indeed, they cannot make any such claim.[12] The fact remains that the decision below is

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[12] There are numerous cases from other circuits holding that municipalities might be held liable on a deliberate indifference standard under circumstances similar to that presented here. In addition to Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th Cir. 1990), discussed at length in the decision below (App. 41-43), see e.g. Hall v. Marion School Dist. No. 2, 31 F.3d 183, 196 (4th Cir. 1994). The Fourth Circuit there held that a school board might be held liable for the dismissal of a school teacher by a principal, where the board was aware of the

consistent with well-established law on governmental liability. In any event, the exact contours of the Monell issue are not properly presented by the Petition since Respondent was not afforded any discovery on the full extent of the Board of Governors' knowledge of, and responsibility for, the First Amendment violations at issue here, but did present sufficient evidence to require denial of the summary judgment motion.

It is of course a truism that governmental bodies cannot be held responsible for the constitutional violations of lower level officials. Unless the constitutional violation was the result of a policy or custom of the governmental body, liability cannot be imposed.

This Court has also established that if unconstitutional action is taken by lower-level subordinates and the governmental policymakers are unaware of such improper action, those policymakers have no duty to investigate the situation, and the municipality cannot be held liable under such circumstances. As this Court noted in Praprotnik, 485 U.S. at 130, "...the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of discretionary authority, especially where...the wrongfulness of the subordinate's decision arises from a retaliatory motive or unstated rationale."

It is also a truism, as established by this Court in Canton v. Harris, supra, that governmental liability can be established by the "deliberate indifference" of the governmental policymaker toward the constitutional rights of others. Contrary to petitioners' assertions, that "deliberate indifference" standard in this context is more than negligence, but involves at the least, knowledge by the decisionmaker of the actions taken by subordinates alleged

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decision to terminate the teacher, was aware of her First Amendment activity and "refused to intervene" on her behalf.

to be unconstitutional, adoption of the action taken below and a refusal to make any inquiries as to the possible unconstitutional action of which it was aware. See cases cited in fn. 12 above.

The decision of the Third Circuit below is in conformity with this Court's decision in Canton and this Court's holding in Waters v. Churchill, 114 S.Ct. 1878 (1994), which was decided before the Third Circuit's decision in this case. Petitioners denigrate the Third Circuit's adoption of a rule that policymakers "must tread with a certain amount of care" when claims of unconstitutional action are presented to them. But that is precisely the rule that this Court adopted in Waters, 114 S. Ct. at 1889.

This Court noted that policymakers have some obligation to make reasonable inquiries when speech by government employees is alleged to be the basis for dismissal action. This is equally true when there is some dispute over exactly what was said by the employee, as in the Waters case, or, as here, when there is a claim presented to the policymakers that First Amendment protected speech or action was the basis for the decision to take dismissal action against him. In both situations, the policymakers cannot be "deliberately indifferent" to specific First Amendment claims presented to them.

In Waters, this Court held that there was sufficient evidence presented by the plaintiff to require trial by a fact-finder as to the motivation of the policymakers who fired her. "Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation," 114 S. Ct. at 1891. Although the employer claimed that the reason for the discharge was because of the allegedly disruptive speech of the employee brought to their attention, this Court said that a fact-finder might conclude that it was "because of nondisruptive statements" that the employee might have made "or because of some other statements she may have made earlier," id. at 1891. It was up to the jury to determine the true motivation, as in any other Mt. Healthy case.

Exactly the same situation is presented here. Petitioners claim that Respondent was dismissed because of the specific acts of misconduct charged against him. Respondent disputes that claim. As the Court below noted, Respondent presented extensive evidence of his protected activities which was "well known to the individual members of the Board." (App. 43). The dissenting opinion of Walter Wechsler shows that the members were also aware that other faculty members "had had students perform uncompensated work for them, yet were not disciplined."(Id. at 44). Furthermore, extensive material was presented by Respondent's lawyer to the Board of Governors about the "personal 'vendetta'" by members of his department (id.) This was more than sufficient to hold the case for trial as to whether the reasons offered were pretextual.

III. The Decision Below was not inconsistent with this Court's decision in Mt. Healthy.

Petitioners' third point in their petition is confusing and unclear. If Petitioners are saying that they cannot be liable for unconstitutional acts by their subordinates unless it can be shown that they participated and shared in that motivation, that issue is already subsumed in the Monell point above.

Petitioners may be claiming that governmental bodies cannot be held liable for retaliatory discharges unless there is concrete evidence of their "purposeful intent" to discriminate -- that an employee must show a "smoking gun" involving explicit anti-expressive sentiments by the policymakers. That claim is foreclosed by this Court's decision in Mt. Healthy and the cases interpreting it.

Mt. Healthy held a plaintiff must demonstrate that he or she engaged in protected activity and that such activity was a substantial motivating factor in the decision to take adverse employment action. The burden then shifts to the employer to show that it would have taken the same action in the absence of the protected conduct. As in any employment discrimination situation, an employer will

always find other justifications for the action. See e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 254-55 (1989) (applying Mt. Healthy standard to Title VII situations and noting that employers always present non-discriminatory reasons for their action).

As in any type of situation involving claims of improper motivation by an employer, there is seldom direct proof of "purposeful intent" to discriminate. As the Tenth Circuit recently stated:

> ...none of plaintiff's allegations amount to a "smoking gun" that prove his firing was related to his incident report [and therefore violated the Mt. Healthy rule]. Still, "allegations of retaliation are often supported only by circumstantial evidence." Durant v. Independent Sch. Dist. No. 16, 990 F.2d 560, 564 (10th Cir. 1993). Plaintiff has put forth sufficient evidence to create a circumstantial case that he was fired in violation of his first amendment rights. Questions concerning whom to believe in this matter are reserved for the jury.

Bisbee v. Bey, 1994 WL 598855 *3 (10th Cir. Nov. 3, 1994).

There are numerous cases to the same effect. See McDonough v. Trustees of University System of N.H., 704 F.2d 780, 784 (1st Cir. 1983)("A . . . hesitation to resolve these cases on a less than fully developed record is evidenced by the reluctance of many Circuit Court of Appeals to approve a grant of summary judgment in Pickering-Mt. Healthy cases"); Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982): " . . . Peacock's First Amendment causes of action necessarily involve complicated questions of motive and intent. A fair resolution of these difficult issues requires a full trial on the merits"; Connor v. Reinhard, 847 F.2d 384, 395 (7th Cir. 1988)(summary judgment inappropriate in Mt. Healthy situation).

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Dated: New York, N.Y.
December 14, 1994

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No. 94-872 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 1994

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Petitioners,

—against—

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent suggests that the questions presented by petitioners are not proper for review because the facts of the case are unique and the Third Circuit (in addition to establishing three novel legal principles contrary to seven other courts of appeal and this Court's precedent) also remanded to the trial court for further discovery on a limited issue. He also suggests that extensive further proceedings will take place in the district court even if this Court grants the petition and

reverses on all the grounds presented by the petition. These suggestions are all incorrect.[1]

The limited additional discovery for which the Third Circuit remanded is solely on the issue of whether the University was aware of other employees who committed comparably egregious offenses and imposed discipline less severe than dismissal or no discipline at all (App. 19). Although discovery had been provided regarding other employees, the Third Circuit expanded the scope by its use of the word "comparable." The legal questions presented by the petition do not turn either on that issue or on the precise facts of this case. Further proceedings on remand will not sharpen or change those legal questions. This case is in an appropriate and timely posture for this Court's review of the questions presented by the petition because the district court is compelled to apply the Third Circuit's novel legal standards on remand. This Court's review and reversal of the Third Circuit's holdings on the legal questions presented would eliminate any need for the district court either to readdress the precise facts of the case or to reopen even limited discovery, because the district court would then be required to grant complete summary judgment for petitioners, as it had done originally.

Moreover, neither the precise facts of this case nor the proceedings on remand have any bearing on the pressing importance to all public employers (and hence the public) of having the legal questions presented herein decided by this Court now. How those questions are decided affects not only pending lawsuits but, more important, the making of personnel decisions by public employers on a daily basis. The tremendous burdens imposed by the Third Circuit's novel holdings chill decisionmaking by public employers that is essential to

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[1] Although the respondent's brief in opposition to the petition contains a number of inaccurate statements regarding the facts of record, discovery, and other matters, these do not bear directly on the questions presented by the petition; hence, petitioners do not reply to those inaccurate statements.

the public they serve. It does enormous harm to public institutions, that have an overriding public mission to fulfill, not to be able to dismiss employees for misconduct promptly and with any degree of certainty. Uncertainty undermines the institution's credibility with the public, victims of the misconduct, coemployees, and, in the case of educational institutions, students. Uncertainty also undermines the morale of employees who are capable of adhering to standards of conduct because they see their public employer disempowered from taking appropriate personnel action as to other employees who take encouragement from court decisions that they can misbehave with license.

A public employer in the Third Circuit can no longer discharge a public employee for egregious misconduct (even with due notice and an opportunity to be heard). Rather, the Third Circuit's standards could be read to require a public employer first to perform a background investigation to determine (1) whether the employee ever filed a grievance or lawsuit about anything; (2) whether any nondecisionmaking subordinate had an unarticulated, unconstitutional motive in favoring the employee's termination; and (3) whether any other employee ever committed comparably egregious misconduct, as yet undetected. If any of the foregoing are found on investigation, the public employer acts at its peril in discharging its employee for the egregious misconduct originally contemplated as the basis for its decision. Termination at that point virtually assures that the public employer will be faced with the need to defend a full-scale costly lawsuit through trial.

The need for review by this Court at this stage in the proceedings is apparent from the Third Circuit's statement, after it addressed the discovery issue:

> In light of our decision to vacate the district court's grant of summary judgment in San Filippo's first amendment

> claim, we *need* to address certain other issues that are *relevant* to the course of proceedings on remand.

(App. 20; emphasis added). The Third Circuit then enunciated as necessary and relevant to its remand decision the three new legal principles review of which is sought by the petition.

I. The First Amendment Petition Issue

First, the Third Circuit decided that a public employee's lawsuit or grievance that does not involve a matter of public concern is protected First Amendment activity. This is a wholly legal question that does not turn on the facts of this case. Further, the limited additional discovery for which the Third Circuit remanded is completely unrelated to this issue. Moreover, contrary to respondent's assertion (Brief in Opp. 17), the Third Circuit decision on the petition issue is necessary to its decision, as the court itself stated:

> The district court's conclusion that San Filippo engaged in some protected activity [speech] does not make this dispute [on the petition claim] academic. San Filippo wants, (a) the fact-finder to be instructed that dismissal in retaliation for any or all of his lawsuits and grievances constitutes a first amendment violation, and (b) to argue to the fact-finder that the close proximity in time between his 1985 lawsuits and the decision to file formal charges against him supports an inference of retaliation.

(App. 22n.14).

Finally, should this Court grant the petition and reverse the Third Circuit's decision, the district court's grant of summary judgment for petitioners on the First Amendment petition claim must be reinstated as a matter of law. Whether conduct is constitutionally protected is a question of law, not of fact. *Connick v. Meyers*, 461 U.S. 138, 148n.7 (1983). The district court has already determined that San Filippo's grievances and lawsuits do not involve matters of public concern (App.

81-83). Therefore, if this Court grants review and determines that a petition must involve a matter of public concern to be constitutionally protected activity for a public employee, as the district court previously held, summary judgment will be entered once again against San Filippo on his petition claim.

II. The Entity-Liability Degree of Culpability Issue

Second, the Third Circuit established a standard akin to negligence as the degree of culpability necessary to hold a governmental entity liable under 42 U.S.C. § 1983 for the acts of its non-decisionmaking subordinates, *i.e.*, a failure to "tread with a certain amount of care." This, too, is a wholly legal question that does not turn on the facts of this case. Further, contrary to San Filippo's assertion which completely mischaracterizes the nature and scope of discovery on remand (Brief in Opp. 22), the limited additional discovery on remand is completely unrelated to this issue.

Finally, should this Court grant the petition and reverse the Third Circuit's decision on this issue by reaffirming the deliberate indifference standard, summary judgment against San Filippo would be required on his only remaining claims, *i.e.*, his First Amendment claim within which his Equal Protection claim has been subsumed. Contrary to San Filippo's assertion (Brief in Opp. 22-23), a public employer's knowledge of a public employee's protected activity and a failure to investigate the unarticulated potentially unconstitutional motivations of nondecisionmaking subordinates does not establish deliberate indifference as that standard has been defined by this Court. *E.g. St. Louis v. Prapotnik*, 485 U.S. 112, 130 (1988) (failure to investigate not enough); *Canton v. Harris*, 489 U.S. 378, 388 (1989) (deliberate indifference standard).

III. The Purposeful Intent Issue

Third, the Third Circuit removed the purposeful intent element from a First Amendment retaliatory discharge claim and

substituted a negligence standard as the degree of culpability, *i.e.*, requiring the actual decisionmaker "to 'tread with a certain amount of care' to avoid 'the possibility of inadvertently punishing someone for exercising [his] First Amendment rights.' " (App. 44n.26). Resolution of this issue does not turn on the facts of this case and would not be affected by the further limited discovery for which the Third Circuit remanded the case.

Should this Court grant the petition and reverse the Third Circuit decision by reaffirming the purposeful intent standard, the district court once again would enter summary judgment against San Filippo. He expressly concedes that he does not claim that the decisionmaking Board members themselves were motivated by his First Amendment activities in their decision to dismiss him (A255, 222-27).

In sum, all of the questions presented are ripe for review. This Court routinely reviews legal standards announced by the courts of appeals to be applied by the district courts in further fact-finding proceedings on remand. For example, in *Waters v. Churchill*, ___ U.S. ___, ___ S.Ct. ___, 128 L.Ed.2d 686 (1994), this Court reviewed a legal standard announced by the Seventh Circuit to be applied by the district court in further fact-finding proceedings on remand, where the Seventh Circuit had vacated the district court's grant of summary judgment. 128 L.Ed.2d at 703. *See also Canton v. Harris*, 489 U.S. 378 (1989) (where the Sixth Circuit had affirmed the district court on the question on which certiorari was granted, but reversed and remanded for a new trial on other grounds).

Of paramount importance is the real need of public employers in the Third Circuit to have that court's holdings, which establish novel legal principles contrary to seven other courts of appeals and this Court's precedent, reviewed now.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, the Court should grant a writ of certiorari on the three questions presented therein.

Respectfully submitted,

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